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MADRAS LAW JOURNAL

II] JULY [1937

RETIREMENT OF SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice.*

The Chief Justice, Sir Owen Beasley, has retired. Our good wishes go with him in his retirement. Unlike his predecessor he was not a brilliant lawyer or distinguished student. His administration aimed at introducing system and regularity in the working of the High Court. Sudden changes, breakdown of lists, and the calling in of lawyers to argue unexpected cases low down in the list did not happen in his regime. Same Benches were allowed to continue for a whole session.

When he sat on the Original Side in the beginning of his career and even for some time after he became the Chief Justice, he was remarkable for the patience he showed in the hearing of cases. Soon the administrative work of the Chief Justice told on him. The obsession of arrears which overtook, more or less, every Chief Justice in recent years made him impatient of long argument. That he intended to be both kind and friendly to the Bar, as far as he knew how, is shown by the very spacious accommodation he gave to the Advocates' Association and readily lent ear to representations that more space was required. His manner in Court was widely felt to be curt and rough even when he intended to be not unkindly so much so that even the senior practitioners did not go into his Court with a sense of ease and freedom. It often led him into misunderstanding which a little tact and suavity might have easily avoided. The Bar, more than ordinarily sensitive, made little allowance for one who did not always correctly understand them or, as he himself put it, half in a spirit of confession, for one who had to work in an unfavourable and trying climate.

He refused to pass over cases except very occasionally partly in the belief that he was thereby helping the junior practitioners and partly with the idea that he was thereby approximating the practice of the Court to that of the Highest

English Courts. Sometimes, cases were dismissed and refused to be restored, even when there were justifying circumstances. All this was in disregard of the local conditions to which the English practice should not have been applied with undiscriminating rigour. This did not make for popularity, but only added to the dissatisfaction and irritation of the Bar. In the last few months he tried to retrieve it, but it was too late to placate the Bar which, in this generation, neither believes in, nor cultivates, the art of forgetting, and will not relax even in the case of a retiring Judge who leaves for good. After all is said and done, he was essentially a Judge anxious to do justice. He was not gifted with those arts by which a less just and kindly Judge covered things up by his external manner.

One of his strongest claims to our grateful recognition is his freedom from all communal prejudices. When he found himself confronted by obstructive communalism in the discharge of his duty, he did not hesitate to act strongly. He resigned his place on the Law College Council when he found that the Council's advice was not accepted by the Government, and in all his recommendations, he showed this freedom from narrow prejudices. He maintained a high standard of independence and had the feeling that he did not get due appreciation at the hands of the Bar.

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INDIAN FEDERATION.

Law was the possession of clerics in both East and West and has affinities with scholasticism in the west and its equivalent the *mimamsa*, in the east. Law and scholasticism are alike in the native temper of the average Indian intellectual. Politics has, for some time, been, and at the moment is, our major pre-occupation. The Government of India Act and all the legal and quasi-legal and political questions arising from it engage much of our attention. That part of the Act that relates to the Federation of the States and Provinces has a peculiar fascination for the lawyers. It has a juristic interest for them. Their *mimamsa* has full scope for exercise. Constitutional law and the dubious territory that lies between it and international law justly claim both their interest and attention. One of the vigorous and thoughtful contributions to the elucidation of this topic of Federation is now before us. The author, Mr. N. D. Varadachariar, one of our young intellectuals, delivered three lectures on the topic under the auspices of the Madras University in March, 1936. They have since been made available to the public in the form of a book of over one hundred and fifty pages published by the Oxford University Press under the title, " The Indian States in the Federation ". Though we may not agree with all the viewpoints of the author, his book must be recognised as an able contribution to the study of a knotty subject. The author wields an attractive and persuasive style. His book deserves the attentive study of all who are interested in politico-legal thought and furnishes a good introduction to the study of the Indian Federation.

No one is likely to enthuse over the Indian Federation in the Act. Its weak points are well brought out in the book,

Few will disagree with the author's estimate of its character. In one passage he had almost pronounced it to be no real Federation at all, That it is unlike any Federation hitherto known cannot be gainsaid. It lacks symmetry. The relation between the Federation and its component units is unequal. The States do not occupy, in relation to the Federation, the same position as the Provinces. Even the States need not all bear the same relation to the Federation. Their instruments of accession may vary in terms. These instruments do not stop with their primary function of bringing the States into the Federation. They remain to regulate and control the further development of the Federation. While the Imperial Parliament can amend the Act as to the Provinces in any manner they like, they cannot amend it in regard to the States except within the limits authorised by the instruments of accession. While the States that enter the Federation have no right to secede from it at any time at their option, it is possible that, in conceivable circumstances, they may be thrown out of the Federation. The people of the States are nowhere in the picture and had no say in the matter. They are within the Federation, but are, in every respect, represented by the Princes. They have no direct relation with the Federation. These and other peculiar features to which the author refers in detail amply justify his criticism. The peculiar character of the Federation is, without doubt, due to the fact that the Indian Princes, the Imperial Parliament and the British Indian Peoples had different aims and ambitions and purposes to serve and pulled different ways. The Indian nation that the author refers to in some passages does not yet exist even in embryo. The ultimate unification of India and establishment of Indian freedom figured in the talks as the goal, but had very little influence in the shaping of the actual conduct of the parties concerned. This Federation will probably remain for ever unique and in a category all by itself.

In the exposition of the unique character of the Federation and of the contending forces that gave it that character, the author has left nothing unsaid; but in the course of the disquisition he makes some points of a very controversial character. These points revolve round the three words "Sovereignty," "Treaty," and "Federation." Before I advert to these points, I wish to make some general observations calculated to indicate the nature of my criticism.

I think it is Mr. H. G. Wells that says somewhere that lawyers are more concerned with words than with things or facts. The first reaction to the criticism is naturally angry repudiation in the minds of lawyers. It does seem at first sight strange and inexplicable how that impression arose in relation to a profession which is concerned with the most real thing as the world understands it. Not having the passage at this moment, I cannot say what the provocation was for that comment. Occasionally however when we come to consider some basic or fundamental conceptions, discussion may, and often does, take a form which, if it does not justify the sweeping criticism, at any rate, explains how an adverse critic came to form that impression. Terms and meticulous definitions may dominate the discussion and essential facts may be lost sight of.

The next observation I desire to make is that the Indian lawyer is apt to measure and estimate all facts in the light of the categories of English Jurisprudence. Austin's analytical jurisprudence holds us still in its grip. There is something rigidly precise and logical in analytical jurisprudence that captivates the scholastic temper of the theoretic lawyer. But it is based upon the limited facts of a phase of life and institutions in one part of the west. When life moves on, confronts new situations, adapts itself to them by new devices, political and legal, and new laws emerge, jurisprudence must expand so as to accommodate itself to the new facts. Take, for example, the condition of the Commonwealth after the Statute of Westminster. The old law *seems* to remain the same, but the situation is wholly altered. In legal theory the Parliament can repeal the Statute and alter the constitution of each Dominion. But by convention based on express agreement embodied in the Statute, it is prevented. Thereby new conventions capable of transcending and controlling law have emerged. Even the conception of the origin of conventions and of their power and efficacy—I refer to it because it has come into current controversy—has become altered. Our juristic notions have all to be overhauled in the light of the new devices to meet a new situation. This is in reference to the changing facts of one and the same country.

This principle which has to be recognised in regard to the evolution of legal phenomena in the same country suggests

caution in applying the notions of British jurisprudence to another country. As notions may be common to all laws, there are bound to be elements in a jurisprudence that are of universal validity and application. There may be elements of wide, but not of universal, application. There may also be elements that cannot be applied without considerable reservations to other countries with totally different sociological conditions and therefore with differing institutions and differing laws and basic conceptions. When we get to a country like India with institutions and facts of life unlike any in England, either the notions of jurisprudence have to be expanded so as to subsume all the new facts under its widened categories or it must be clearly recognised that it is not legitimate to draw upon it except for broad analogies and comparisons. *In any case, the new facts of one country cannot be compelled to accommodate themselves to the theories of a foreign jurisprudence erected on its own limited facts.*

Another point cognate to what has been said above is this. It is illegitimate to describe an institution of one country by a term of description applied in another country and then base on the connotation of that word of description notions as to the character which it ought to possess totally inconsistent with its known character. This will be accepted as obvious without argument. But we are all of us prone to slide into it all unconsciously. What is at first utilised merely as a rough and sufficient description is afterwards founded on, for drawing inferences which do not follow.

These three points of reflection and criticism which are really three phases of the same point arise in my mind as I try to understand and follow the viewpoints of the author. Incidentally, one may remark that these weaknesses are not peculiar to law but are exhibited in most other spheres of thought as well, and they require to be carefully watched and excluded. I must now make good these points of criticism that I have taken the liberty to make.

First there is the question whether the Indian State has sovereignty. I consider it to be largely a question of terminology. No claim of the Princes really depended on the definition of " Sovereignty " or " Federation." No enlightenment as to the true meaning of those words, as conceived by the

author, would have persuaded the Princes to abate or give up any of their claims. At some remote past they possessed what might be called sovereignty with all the powers it included. If some of these powers have been given up by them, or taken away from them, the remaining powers are conceived and treated by them as a remnant of their *sovereignty*. Whether they are right or wrong in thinking that these remaining powers could be described as their sovereignty, they wished that as little of their existing powers as possible should be taken away from them for the purposes of the Federal Government. They may be criticised for not agreeing to surrender more, but the definition of sovereignty or Federation had little or nothing to do with their attitude. The Princes often enough referred to their sovereignty, but their claims related not to any powers as flowing from their notion of sovereignty, in the abstract, but to specific existing powers. If they had been persuaded that they had no sovereignty in the juristic sense and that after they joined the Federation and surrendered some powers to the Federal Government, they had even less of sovereignty left in them, it would not, in the least, have affected their claims. They would still have said: "Never mind whether we have sovereignty or not; do not take away these powers from us." The trouble did not arise from any false conception of sovereignty which was either their own, or induced by the exposition of the Lord Chancellor, but from the unwillingness of the Princes to give up their powers for securing the lasting and ultimate interests of themselves and of India as a whole.

In the desire to deny and confute the claim of sovereignty, the author has fallen into an opposite extreme. I take it to be granted that the Imperial Parliament cannot legislate for Indian States. The Privy Council, which has general jurisdiction to hear appeals from all parts of the Empire, cannot hear appeals from the State Courts. The judgments of the State Courts are foreign judgments in British India even as the judgments of the British Indian Courts are foreign judgments in the State. The internal administration of the States is in the hands of the Princes. Thus the legislative, judicial and executive functions of the States are their own. Such interference as there may be is only political and private except in regard to criminal cases and death sentences in some States. It may be fair to say that the surrendered powers leave them no status as international

entities independent of Britain, *vis-a-vis* foreign States. But does that justify the assertion that the States or the rulers of States are *British subjects*? I know of no principle of law or jurisprudence that compels a classification of the Indian States either as British subject or as independent, but not as being neither. Every one who has attempted to describe the relation has characterised it as *sui generis* defying classification under known categories. Their attempt has always been to suggest nearest analogies. The author is aware of these differences of opinion and refers to them. Sir Frederick Pollock advises resort to the analogies of international law as likely to be persuasive. But, notwithstanding all this, the author does not hesitate to say that—

> the States "are no more than subjects of the Crown" (p. 48).
>
> the States "are subjects to all intents and purposes" (p. 49).
>
> their assertion of formal sovereignty enables the crown to affirm that its dealings with them are acts of State (pp. 48-9).
>
> the real anomaly in the position of the States lies in this, that these subjects of the crown are not under the protection of the law (p. 61).
>
> the States are "delegates of the crown" or "royal instruments" (pp. 55, 61, 63).

Firstly, the phrase "subjects to all intents and purposes" is an admission that they are not subjects of the crown in strictness. Secondly, if one is really a subject, can any assertion of one party or the other take away the jurisdiction of the Courts on a matter between sovereign and subject? If no assertion can take away the jurisdiction, will the author maintain that the validity of an action of the British Government in relation to a State can be examined in the British Courts? That it cannot be examined has been already decided by the Privy Council in the case of the Tanjore Raj which the author himself refers to. Lastly, will the author maintain that the rulers of States, being mere *delegates* or *instruments* of the crown, may be put aside, as agents may be in law?

What is a mere aid to understanding should not be used to limit the thing to be understood.

Paramountcy and the indefinite extent of control which it involves, just like superior military power among independent States, are not foundation for any *legal* conclusion.

As for the theory of indivisibility of sovereignty, much may be said in its favour but more may be said against it. In the last analysis it is a matter of terminology.

Where the powers of a Federated State are divided between the centre and the component units and neither can trench on the territory reserved for the other, where is the sovereignty to be located? Modern opinion is in favour of treating sovereignty as divisible. Indivisibility is stated to be the result of limited observation. And federations are specifically referred to as showing its divisibility. Either it has to be treated as divided between them or, if indivisibility is to be preferred as the proper theory, one has to find an escape in positing the sovereignty as being in the centre and in the component states jointly. One has to say that sovereignty cannot be divided, but powers may be, and that where powers are divided and neither can trench on the other's powers, sovereignty is not with either but in both together, conceived as one body, or in the People as whose representatives the centre and the units hold the divided powers. The point on which the theory of indivisible sovereignty fails is that the omnipotence or omni-competence demanded for sovereignty is not to be found in any one body. There are modern complicated political structures which do not admit of the exact location of sovereignty.

Next take the word "treaty". The author speaks as if the essence of a treaty is that it could be broken. The Indian States prefer the word *treaty* as involving a recognition of equality between the parties to it and as adding to their dignity. The British Government allow it freely enough where they do not consider that anything turns on it, but repudiate the term when they wish to assert their unquestionable superiority. They have clearly provided in the Act, and Sir Samuel Hoare has explained, that the Princes cannot be coerced to accept what their Instruments of Accession have not conceded. (S. 101) As for the term 'treaty' involving repudiability, independent states repudiate where they can repudiate with impunity and keep to its terms where they cannot sustain repudiation by their military might. There is no lack of desire among the Princes to repudiate what will not suit them; but repudiation is not in their power. The British Government are too mighty for the Princes, individually or collectively, to defy. That the British have the might to abolish a State, if they so desired, or to compel it to act according to their dictates is obvious; but can it be contended that we can build legal conclusions on it justifying the

compulsion of the rulers to do what the British Government dictate?

CALCUTTA * DEPARTMENT OF LAW * NOT TO BE REMOVED

Let us next take the question of Federation. At every turn the author considers whether the Indian Federation would satisfy the conception of Federation strictly so called. Even Professor Willoughby recognises deviations from the rule of equality and proceeds to cite the example of the German Empire, thereby indicating that he takes even confederation to be a form of Federation. In dealing with the Indian Federation the author in one passage goes so far as to say that the constitution was not a federal constitution in the real sense. But he immediately gets over it with the reflection that paramountcy is there to save the Federation. That is to say, though under the provisions of the Act no amendment of the constitution was possible beyond the limits set by the Instrument of Accession, the paramountcy of the Crown may be used to enable Parliament to transcend them. If paramountcy can help to impose an amended constitution on the States without their consent, then why is an Instrument of Accession at all required in the first instance to bring them into the Federation. Parliament could have used the Crown's paramountcy to impose this very Government of India Act, without all the complications arising from the need to secure assent through various and varying Instruments of Accession. The British Government are now pressing them to join the Federation, because, I suppose, it is in the interests of all India as well as in the interests of Britain. Some have asserted that what is in British interests is also in the interest of all India. Why should not the Paramount Power impose the Act on the States in the exercise of their paramountcy, for the benefit of all concerned? If Instruments of Accession are now required, why is not a new assent, likewise, required to an amending legislation not covered by the initial Instrument of Accession?

There is a fallacy in the argument that as soon as the States have, by their Instruments of Accession, decided to come into the Federation, they have passed into the orbit of Parliamentary legislation and the last remnant of sovereignty in the States is destroyed. If the implication is, as it must be, that the legislative sovereignty has passed to Parliament, why does Parliamentary legislation still stand limited by the Instrument of Accession? If Parliamentary legislation is

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limited by the Instrument, why is it not indubitable proof that the powers of Parliament are both derived from, and limited by, the Instruments of Accession? If that is demonstrably the fact, it cannot be got over either by considering what a true Federation should be and involve, or by a reflection on the saving character of paramountcy with its expansive and expansible jurisdiction, or even by explaining away the limitations on the power of amendment as mere procedure.

The expansible paramountcy is only another name for the irresistible might of the British arm on which no legal argument should be founded. Nor is it right to rely on the power of Parliament to transcend limits set by its own predecessors. Parliamentary legislation *within its own sphere* is not bound by any limitations on its powers imposed by previous legislation. This legislation, however, is not within its own sphere; nor are the limits those set by a previous Parliament. They are limits arising from the rights of States admittedly not subject to Parliamentary legislation now.

We have now constitutional analogies to disprove the validity of the argument from power. The Imperial Parliament can legally repeal the Statute of Westminster. And yet it is in the last degree improbable if not impossible. Can it be said that the equality of the Dominions and Britain which that Statute establishes can be denied, because of this theoretic legal power?

The States have a higher case than the Dominions for their claim, because Parliament never had any legal power over the States, as they had over the Dominions.

If this is not a Federation according to the author except for the existence of paramountcy and the power of coercion it confers, the proper view is to treat it as no Federation in the strict sense but as a Federation in a sense, that is, in a separate category by itself. The real facts about the Indian Federation cannot be ignored or slurred over in order to find a place for it within the category of Federations strictly so called.

When one comes to think of it, it is rather suprising that paramountcy should be relied on as a force on the side of India or as compensating for defects in the Government of India Act. Paramountcy in the British Crown is what will always be a stumbling block in the way of Indian unity and the development of the Federation. If Britain considers the States

to be a bulwark for the preservation and perpetuation of her interests, paramountcy will not be used to advance Indian interests exclusively where they conflict with British interests. There is a point at which British and Indian interests will always diverge and conflict, and paramountcy cannot help India as against Britain. Far from helping the Federation to its ultimate goal as India sees it, paramountcy will ever be in its path. Without breaking the present conception of paramountcy, India can never come into its own. Paramountcy *may* abolish itself even as Imperial Parliament has abolished itself in relation to the Dominions and has created a Commonwealth. Political wisdom may dictate the one, as it has dictated the other. But there are thinkers that hold that what Britain has chosen to do for the people of her own stock, she will not do for the people of India. Be that as it may, we are here concerned only with this, that unless paramountcy stands abolished *in fact*, even if not in theory, just like Parliamentary Supremacy in relation to the Dominions, the political unification of India involved in the conception of Federation will not be complete.

T. R. VENKATARAMA SASTRI.

SUMMARY OF ENGLISH CASES.

In re ANDREW: *Ex parte* OFFICIAL RECEIVER (TRUSTEE), (1937) 1 Ch. 122.

Insolvency—Bankruptcy Act, 1914, *S*. 40, *sub-S*. (1)—*'Benefit of execution', meaning of—Amounts recovered towards decree—Balance due—If recovered amounts can be claimed back.*

A creditor obtained a decree against the debtor and on the same day took out a writ of *fi. fa.* and seized the debtor's goods in execution. An arrangement was then entered into between the creditor, the debtor and the Sheriff's officer, under which possession of the goods seized was to be given up by the sheriff's officer to the debtor on condition that a portion of the decree amount was forthwith paid over before delivery and the balance should be paid in certain monthly instalments. The sheriff was to have the right of re-entry under the writ in case of default by the debtor in payment of any instalment. The debtor paid the first payment and three instalments but as there was default in subsequent instalments the sheriff seized the goods and sold them. But as

before the sale proceeds were paid over to the creditor, a receiving order was made against the debtor on his own petition, the sheriff paid over the sale proceeds to the trustee in bankruptcy. But the trustee claimed payment of the sums paid over to the creditor previously as the "benefit of the execution" within the meaning of S. 40, sub-S. (1) of the Bankruptcy Act, 1914. The section says that "Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Held, that "the benefit of the execution" does not refer to moneys actually received by the creditor in whole or partial satisfaction of his debt, whether under or in consequence of an execution or not, but that the words refer to the charge which the creditor obtains by the issue of the execution, and that to the extent that by the payment of moneys that charge has been reduced or abrogated, there is *pro tanto* no benefit of the execution to be considered. The fact that the sheriff when he withdrew reserved the right of re-entry on default does not bring the case under S. 40, sub-S. (1). The words are "benefit of the execution" and not "any benefit from the execution" or "any benefit arising out of the execution". To the extent to which the debt has been actually discharged, it is impossible to apply to money so paid the appellation of "the benefit of the execution". The money so paid becomes the money of the creditor with the result of wiping out *pro tanto* the debt. The trustee cannot therefore claim back such sums.

In re A JUDGMENT-DEBTOR, (1937) 1 Ch. 137.

Insolvency—Decree against debtor—Debtor going out of country bona fide*—Notice to debtor's solicitors of a bankruptcy notice—If valid notice against the debtor.*

A decree for money was obtained against an aviator, who a few days after the decree left England by air to a distant place. The decree-holder through his solicitors sent a letter to the debtor's solicitors intimating to them that a bankruptcy notice had been issued against the debtor and asking for "an early appointment to serve him (debtor) with a copy thereof". The debtor's solicitors intimated that the debtor had left the place and could not be served and that he was expected to be back in a few weeks. Nevertheless the creditors got from the Registrar an order for substituted service making the requisite allegations against the debtor of intent to defeat or delay the creditors, which was found to be unjustified and intimated that order to the debtor's solicitors and to the place of

debtor's business in London. This bankruptcy notice required that the notice should be complied with within seven days.

Held, that it is not a notice to the solicitors but a notice to the debtor care of his solicitors, which is no more than another way of giving him notice at a different address. The solicitors cannot be sufficient agents for this purpose. It is he and not his solicitors that has to decide whether he will pay the debt and the notice giving a week's time within which the creditor knew the debtor will not return is an insufficient notice. A person shall have effective notice, if it be possible, of any process instituted against him in the courts and certainly none the less because that process is a bankruptcy process.

In re LEIGHTON'S CONVEYANCE, (1937) 1 Ch. 149.

Mortgage—R. S. C., O. 16, r. 28 and O. 65, r. 1—Costs of mortgage action—'Poor person'—Costs against—If can be added to the security.

It is the ordinary right of a mortgagee to add to his security all costs, charges and expenses reasonably and properly incurred in ascertaining or defending his rights, and in recovering the mortgage debt. It is not really a matter which arises in connection with the awarding of costs. Under O. 16, r. 28, R.S.C., "no poor person shall be liable to pay costs to any other party". Where therefore a mortgagee's title is attacked by somebody who is a stranger to the mortgage and the mortgagee is obliged to defend it, the mortgagee is entitled to add the costs to the security, though the plaintiff might have got leave to sue as a poor person; for there is no question of the poor person being ordered to pay any costs but only an order that it shall be added to the security, so that subsequent mortgagees, etc., may not escape liability for the costs.

WILLOUGHBY *v.* ECKSTEIN, (1937) 1 Ch. 167.

Easement—Light—Prescription—Two adjoining premises owned by one person—Lease of one to A—Lease reserving expressly right to build on next site so as to obstruct light to A—Later lease of the other site to B—Building by B obstructing light to A—A having enjoyed light for over statutory period before B's building—If building by B can be restrained—Effect of agreement reserving right to obstruct light—Prescription Act, 1832, S. 3—'For that purpose' in S. 3, meaning of.

The plaintiff and defendant were lessees of adjacent buildings from a common landlord. Some of the windows in the plaintiff's premises face the defendant's premises and they were enjoyed by him for over the statutory period. The defendant raised the height of his building to a greater height than before with the result that the plaintiff's windows were obstructed. The lease in favour of the

plaintiff conferred on the plaintiff certain rights of way and user over defendant's premises and added the term "but without including any rights of light or other easements over other ground or premises and subject nevertheless to all rights and easements belonging to any adjacent property and subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans both as to height, elevation, extent and otherwise as shall or may be approved of by the ground landlord for the time being." The plaintiff brought an action to compel the defendant to remove the obstruction to light and air under S. 3 of the Prescription Act, 1832. The section says that "when the access and use of light to and for any dwelling house . . . . or other building, shall have been actually enjoyed therewith for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible . . . unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Held, that in the absence of an agreement excluding the operation of the Prescription Act, where two tenements are held by different lessees under a common landlord and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement without interruption, that lessee acquires an absolute right to light as against the other tenement. This right enures in favour of that lessee and his successors, not only as against the other lessee but also against the common landlord and all succeeding owners of the other tenement. But here there was the agreement in the lease to the plaintiff which contained an express exception out of the demise of any right to light in respect of the demised premises, the effect of which was to make the enjoyment of light by the plaintiff in respect of the leased premises only a permissive one throughout the whole of the term of the lease.

LONDON, MIDLAND AND SCOTTISH RAILWAY COMPANY *v.* GREAVER AND ANOTHER, (1937) 1 K.B. 367.

*Railway—Bye-law—Prohibition against transfer of a partly used ticket—How for valid—*Ultra vires*—When a bye-law is* ultra vires.

A railway issued certain concession excursion tickets which were not transferable. One *K* purchased an excursion ticket at a concession rate, travelled on the railway from *M* to *L* station and at *L* station handed the partly used ticket to one *G* who received the same with the intent of travelling with that ticket from *L* to *M*. Charges were preferred against *K* and *G* for unlawfully transferring a partly used ticket and receiving such a ticket respectively with the fraudulent intention.

Bye-law (6) of the Railway Company's bye-laws provides that "no person shall sell or buy or attempt to sell or buy any ticket . . .

or transfer or receive any partly used ticket or season ticket to or from any other person with intent that any person shall use the same for the purpose of travelling or conveyance upon the railway, unless the ticket shall at the time of issuing thereof purport to be transferable, and no person shall knowingly and wilfully use or attempt to use any ticket which has been sold, bought, transferred or received in contravention of this bye-law. . . " The bye-law was framed under the Railways Clauses (Consolidation) Act, 1845, S. 108 of which provides that the company can make bye-laws "generally for regulating the travelling upon or using the working of the railway" subject to the provision that "such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect." It was contended that the bye-law was *ultra vires* and invalid as it throws the net too wide inasmuch as it covers also cases in which no element of fraud appeared.

Held, that the bye-law was not invalid. The bye-law is intended to prevent buying and selling of tickets upon terms which will prevent the railway company from getting its fair and proper payment. A sum which is not paid to the company or its agent cannot be a fare, and a person who intends to travel with a ticket bought otherwise than from a servant of the company is intending to travel without paying his fare. A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful.

WURZEL *v.* HOUGHTON MAIN HOME DELIVERY SERVICE, LIMITED; WURZEL *v.* ATKINSON AND OTHERS, (1937) 1 K.B. 380.

Road and Rail Traffic Act, 1933, *S.* 2, *sub-Ss.* (1) (*c*) *and* (4) *Motor goods carriage with C license—Carriage owned by a society—Incorporated and unincorporated societies—Carriage from colliery of coal to houses of members—Payment for same from their salaries—If the society guilty of using the carriage "for hire or reward."*

The Road and Rail Traffic Act, 1933, provides in S. 2, sub-S. (4) that "a private carrier's license shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward. . . . . " This licence is called '*C*' licence.

In the two cases the question came up this way. The first was the case of an incorporated society and the other was the case of an unincorporated society. The activities of the society were confined to the delivery to its members of coal supplied to the members from the colliery by the colliery company. For that business the societies owned motor goods vehicle with a '*C*' licence. The society

carried the coal by this vehicle and delivered it at the houses of its members and the charges for such deliveries were deducted from the wage of each member by the colliery company and paid to the society.

Held, that (1) in the case of the incorporated society, the society was a legal entity different from its individual members and therefore the carriage was used there "for hire or reward" by the society as it collected the charges from the member but in case (2), that is, of the unincorporated society, there was no limited company and therefore the society was not different from its individual members. As such the persons at whose houses the coal was being delivered were among the owners of the motor vehicles which were making the delivery and it cannot be said that they were having their coal carried in those vehicles for hire or reward because it will then mean that they were hiring from themselves or rewarding themselves.

STAFFORD *v.* KIDD, (1937) 1 K.B. 395.

*Evidence—Admissibility of—Spouses living apart under a deed of separation—Birth of child afterwards—If wife entitled to let in evidence of husband's non-access—*Russell *v.* Russell *rule—If applies after separation under a deed.*

Execution of a deed of separation by a husband and wife, together with evidence that the deed was acted upon by the parties, has the effect which a decree of judicial separation might have of getting rid of the presumption of legitimacy so as to admit of evidence of non-access being given by the wife, although such evidence, if accepted, would have the effect of bastardising the child. The case of *Russell* v. *Russell*, 1924 A.C. 687, has no application to such a case and evidence of non-access can be admitted.

UNITED DAIRIES (LONDON), LIMITED *v.* STIRLING, (1937) 1 K.B. 402.

Workmen's compensation—Workmen's Compensation Act, 1923, *S.* 9; *sub-S.* (4)—*Workmen's Compensation Act,* 1931, *S.* 1, *sub-S.* (1)—*Accident to workwoman—Loss of three fingers—Full compensation paid for some time—Application by employers to reduce—Dismissal of—Partial incapacity treated as total—No work in spite of attempts—Application two years later to review the prior order—No attempts by workwoman later to secure work—Ground for review.*

A workwoman *S* met with an accident in the course of her employment in 1932 and as a result lost three fingers of her right hand which were amputated. Compensation was paid for two years and in 1934 the employers reduced the compensation whereupon

she applied to have full compensation alleging that she tried but could not get any work. The Court then finding that she had taken all reasonable steps to obtain employment but failed to get one granted her full compensation treating the incapacity as partial under S. 9 of the 1925 Act. In 1936 the employers applied to review the order and diminish the payment alleging that since 1934 she had not tried to obtain any work, though they were advised that her hand had so far improved that she was capable of working. The medical evidence was that her hand was practically static and there was no material difference. But she herself admitted that lately she did not take steps to obtain employment.

Held, that the fact that she had made little or no effort to obtain any work was a change of circumstance since the previous hearing which the Court would take into consideration and review the prior order of 1934, treating the incapacity as total. The Court was therefore to find whether the conditions required by S. 9, still continued to exist.

BARKER *v.* ALLANSON AND OTHERS, (1937) 1 K.B. 463.

Practice and procedure—R.S.C., O. 16, r. 9—Common interest —Meaning of.

A suit was brought against the defendants as representing the general body of the members of a colliery lodge for recovery of the balance due in respect of the price of goods sold to various members of the said lodge. The lodge was a branch of a miner's association which was a registered union. The lodge at date of suit had 841 members. In 1921 there were 1093 members. The membership had since changed and the majority of those who were now members were not members in 1921. In 1921, 89 out of the members received goods from the plaintiff, such goods being supplied upon a form of voucher signed by the then secretaries of the lodge and bearing the lodge stamp. Of these 89 some had died, some had paid for the goods which they had received and some had ceased to be members and only 19 of them were still members. The plaintiff had till 1930 received several payments from the treasurer. In 1936 this suit was brought against *A*, the financial secretary, *T* the treasurer, *R*, the chairman and *K*, the general secretary of the lodge as representing all the members of the lodge claiming that the balance was payable by the lodge and out of its funds. The plaintiff applied for leave to sue under O. 16, r. 9, R.S.C., the defendants as representatives of the lodge. The rules of the lodge did not provide for such transactions.

Held, that the representation order under O. 16, r. 9, ought not to be made. O. 16, r. 9 says that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorised by the court or a judge to defend in such cause or matter, on behalf or

for the benefit of all persons so interested". The defendants by representation have not the same interest in the case. The majority of the defendants would, if they had been named as defendants, have been entitled to prove that the goods were not ordered by them or with their authority as they were not members of the lodge when they were bought, others might have other defences like limitation, etc. Where there might be separate defences open to some members of the association and not to others, there would be no common interest within the meaning of the rule.

ATTORNEY-GENERAL *v.* COHEN AND ANOTHER, (1937) 1 K.B. 478.

Revenue—Stamp duty—Finance (1909-1910) *Act,* 1910, *S.* 73 *—Sale of 6 lots to one purchaser—All lots owned by one person—Lots separately sold in auction—Separate bids and separate abstracts of title—If one of a series of transactions.*

At a public auction certain dwelling houses and other premises were offered for sale in 12 separate lots belonging to different vendors. At the auction the defendants bought from the same vendor 6 lots. The defendant's bids were made in respect of each lot separately and separately sold. Two of the lots were for more than 500*l.* each and the others at less than 500*l.* each though in the aggregate it was for more than 500*l.* Six separate contracts were signed by the purchasers, and six separate deposits of 10 per cent. of the purchase price was paid by them. The contracts of sale were each separately stamped. Six separate abstracts of title were supplied. S. 73 of the Finance Act, 1910, provides that "the stamp duties chargeable under the heading 'conveyance or transfer on sale of any property' in the First Schedule to the Stamp Act, 1891 . . . shall be double those specified in that schedule, provided that this section shall not apply to . . . a conveyance or transfer where the amount or value of the consideration for the sale does not exceed 500*l.* and the instrument contains a statement certifying that the transaction thereby effected does not form part of a large transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds 500*l*". The conveyances each contained such a certificate.

Held, that the sale did not form part of a larger transaction or of a series of transactions in respect of which the aggregate value exceeds 500*l.* within the meaning of S. 73 and that therefore in the cases where the consideration was each less than 500*l.* the double tax could not be levied. The circumstances of the parties being the same, the times of transactions close and the places, the subject-matter of the various conveyances contiguous, are all casual matters which do not make it proper to say that they constitute parts of a series within the meaning of the section, in the absence of any evidence of inter-dependence.

UNION TRANSPORT FINANCE, LIMITED *v.* BALLARDIE, (1937) 1 K.B. 510.

Sale of goods—Factors Act, 1889, *S.* 8—*Purchase by agent on behalf of his principal of a car—Car let on hire by agent to an impecunious employee of the seller—Transaction colourable one—Agent aware of it—Possession continuing with the seller—Seller letting out on hire-purchase agreement to a third person—Third party so taking it in good faith—If purchasers can claim it from such party.*

The plaintiff company, in the course of their business, buy motor-cars in cash to let them under hire-purchase agreements to would-be purchasers who are not prepared to pay the whole price at once. In 1935 their branch Manager *T* bought for and on behalf of the company a motor-car from *C* and let it on hire to *F*, an employee of *C*. *F* had no private means of his own and was not in a position to buy a car on any terms. He was induced by *C* to sign on hire-purchase proposal on one of plaintiffs' company's printed forms under which 60*l.* had to be paid in cash and balance in 18 monthly instalments. *T* to help *C* to carry through the transaction, which he must have known was not genuine, drew a cheque in *C's* favour for 180*l.* the balance of the car's price. *F* had paid nothing, even the 60*l.* having been paid by *C*. *F.* signed a delivery form for having received delivery. The whole transaction was colourable in the sense that *C*, *F* and *T*. never intended that *F's* part in it should be a real one. The car was with *C*, and was held by him in his own right and not as bailee for *F*. Some months later *C* as owner agreed to let the car to the defendant under a hire-purchase agreement, with an option to purchase it as per its conditions, in consideration of 140*l.* paid as advance and small monthly instalments. It was found that the defendant took the car in good faith, and without notice of any previous sale by *C*.

Held, that as a result of S. 8 of the Factors Act, 1889 the defendant got a good title. S. 8 says "where a person, having sold goods, continues, or is, in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . under any sale, pledge or other disposition thereof . . . to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same". At different stages of this transaction the plaintiff company and *F* had a right to possession of the car, but neither of them had exercised the right at the date of the delivery of the car to the defendant. *C* was not the bailee of *F*, as he never gave possession to *F* nor did he ever attorn to *F*. The original contract with *F* was a contract "personal to the hirer" and it cannot therefore be said that *F* was a nominee for *C*.

BEETHAM *v.* JAMES, (1937) 1 K.B. 527.

Seduction—Girl living with her parents—Parents living together but unmarried—Putative father head of household—Girl doing household duties living with father—Action for seduction, by father—If maintainable.

In 1935 the defendant seduced the plaintiff's daughter by reason whereof she became pregnant. Her parents were living together but were unmarried. The daughter was then 22 years of age and was living with them and actually doing household duties for the father.

Held, that the suit for damages for seduction was maintainable by the father, as he has lost the services of the daughter. The basis of the action of seduction is loss of services from the seduced. It is not because a man is the girl's father and it is not because he is married to her mother that the services are presumed to be rendered to him, but because he is head of the household. The plaintiff was just as much the master of his household as he would have been if he had been married at all times to the girl's mother. He has assumed the duties of a husband and the mere fact that they had not been married cannot affect his position as master of the house. This is not a case of a man paying mere occasional visits to his mistress, when there may be some difference.

FARNHAM *v.* FARNHAM OTHERWISE DANIELS, (1937) P. 49.

Marriage—Petition for nullity of marriage—Evidence of frigida quoad hunc *of woman to the husband—Woman giving birth to a child through another man—Evidence if admissible.*

The marriage between the parties Mr. *F* and Miss. *D* was celebrated in 1933 but has never been consummated because the woman *D* is *frigida quoad hunc* in regard to the petitioner *F*, that is, incapable of performing the intercourse with *F*. But nevertheless she has given birth to a male child in 1935 by intercourse with another man. The husband *F* presented a petition for nullity of marriage. The question was if evidence of intercourse with another and non-access by *F* could be admitted.

Held, that the suit here is not for divorce but for nullity. The issue of adultery or no adultery is not in issue in the case. It may be that, if non-consummation be established, it will result in a finding of adultery and bastardize the child. But *Russell* v. *Russell* does not deal with this class of nullity suits.

THE KAFIRISTAN, (1937) P. 63.

Salvage—Shipping—Collision—Vessel of salving ship's owner partly to blame for the collision—Salving ship's owners not entitled to salvage remuneration.

The owners of a vessel rendering salvage services to a vessel which has been in collision are disentitled to salvage remuneration by reason of the fact that another vessel belonging to the same owners is partly to blame for the collision, because the necessity for these services is partly occasioned by the negligence of their agents in charge of the colliding vessel and no man can profit by his own wrong. The Maritime Conventions Act, 1911, S. 1, has not made any difference in the law.

JOTTINGS AND CUTTINGS.

The new Chief Justice took his seat on the Bench sitting with Mr. Justice Varadachariar. The Advocate-General, in welcoming the Chief Justice on behalf of the Bar, said:—

"In extending to you, on behalf of the Bar, a most hearty welcome", said Sir Alladi, "on the eve of your entering upon the duties of your high office as Chief Justice—an office whose history goes back to the beginning of the 19th century—I crave your Lordship's indulgence in giving expression to a few sentiments. There is no need to indulge in any conventional eulogy, as your reputation has travelled to us much in advance of you, and the echoes of the warm appreciation of your career and work in Burma by the Bar and the litigant public have been heard here. We have come to know you as one who has had a leading and a most lucrative practice at the Bar, who, impelled by a high sense of duty and in accordance with the best traditions of the English Bar, had accepted a place on the Bench and who, within the few years of his career on the Bench, had earned the distinction of being an erudite and independent Judge. The Rangoon Law Reports which are as widely read here as the law reports of the other High Courts in India bear eloquent testimony to your work on the Bench. We have heard of your cordial relations with every section of the Bar and the uniform courtesy which you have shown both in and outside court. Your Lordship will not find yourself in altogether unfamiliar surroundings, as Burma was, until recently, a part of British India governed practically by the same system of laws as this presidency and as its capital city, which I believe to a material degree contributes to the work of the Rangoon High Court, is largely peopled by the banking and commercial communities from this part of India and by the labour population from this presidency.

"In the course of my remarks I may be pardoned if I make a brief allusion to the work of the Bar and its place in the judicial administration of this presidency. Within the short span of its existence, compared with the Bar in England, it has built up a big tradition. Both in the forensic field and in the Councils of the country, the profession in Madras has won renown and made a

great name for itself. Sir V. Bashyam Iyengar, Sir S. Subramania Aiyar, Sir C. Sankaran Nayar, Mr. Justice P. R. Sundaram Aiyar, Mr. V. Krishnaswami Aiyar, Sir K. Srinivasa Iyengar and Sir P. S. Sivaswami Aiyar—not to mention some of the brilliant leaders who are still in active practice—are persons of whom any enlightened country could be proud. From the ranks of our bar have been recruited not merely some of the great Judges in the past, but some of your distinguished colleagues. In point of forensic attainments and legal equipment the Bar in Madras is not behind the rest of India. Speaking with an intimate knowledge of the conditions of the Bar, I am in a position to state that there are young men at this Bar who in point of legal erudition and attainments are not very much behind their senior compeers and who, given the proper opportunity, will give an excellent account of themselves. With possibly rare exceptions, our relations with the Bench have been uniformly cordial and marked by a mutual understanding and respect for each other.

"I am not indulging in any platitude when I give expression to a deeply cherished conviction of mine that in countries permeated by British Jurisprudence, the Bench is closely linked up with the Bar and that neither in practice nor in theory can one think of a strong Bench unless there is a strong Bar. They are alike engaged in maintaining and promoting justice which is the corner stone of civil society. In the words of a distinguished lawyer before the Canadian Bar Association, 'There is no institution of such vital and supreme importance to the State as the existence of a fearless judiciary and a vigilant and independent Bar.' In every sphere of your Lordship's work, whether in any scheme of reform of the machinery of administration of justice, of the rules of the Court, or of the speeding up of legal business, let me assure you of our hearty and sincere co-operation.

"The Bar Council is contemplating a comprehensive scheme of reform of legal education in this Presidency and in their endeavours, I have no doubt, they can confidently look forward to your active sympathy and guidance. Your Lordship is entering upon your duties at the commencement of a new chapter in the constitutional history of India and Indo-British relations. In the new dispensation and with the unfoldment of democracy, the High Courts in India have as important a place to fill as in the past, if not a more important one, as guardians of the liberty of the individual and public order. Let me conclude by once again extending to you a hearty welcome and conveying to you our good wishes."

Chief Justice's Reply.—In reply, the Chief Justice said:—Mr. Advocate-General, I thank you for your very kind words of welcome which you have addressed to me on behalf of the Bar. It is very gratifying to me to know that in taking up the office of the Chief Justice of this great High Court, I do so with the good

wishes of you all. I come among you with knowledge of the manners and customs of some of the people, but much will be entirely new to me and therefore at the beginning, I shall want your special assistance. I am sure that I can count on that in full measure and your assistance, gentlemen, will be of great assistance indeed.

Having been for 30 years a member of the profession which we all have the honour to belong, I appreciate how essential it is for the proper administration of justice that there should be a strong Bar. I know that the Bar of this Court stands second to none. The Court is particularly fortunate in this respect. Another important factor in the administration of justice is the promotion of right feeling between the Bench and the Bar. I am happy to think that that feeling exists here and it will be my concern to maintain it.

Gentlemen of the Bar, you have my assurance of all the help I can give you in dealing with the problems connected with the profession. I look forward to happy co-operation with you throughout my term of office. Mr. Advocate-General, I thank you once more for your kind welcome.—*"The Hindu", 19th July, 1937.*

Presumption of Death.—The disappearance of a famous author-actor from an Atlantic liner in circumstances which seem almost conclusively to imply his death will remind practitioners of the problem that such a disappearance gives rise to in the English probate courts. Although an inquest can be held, and a man tried for and convicted of murder in the absence of a body, yet the English Courts, for the purpose of probate and administration, are reluctant in all cases of disappearance to accept circumstantial evidence of the death. After seven years they will allow a presumption of death. In exceptional cases that period may be shortened. And in one of those exceptional cases, arising from the disappearance of a man from a Channel liner, the presumption was reluctantly allowed after three years of waiting and advertisement. Needless to say, the proceedings of Crown Courts and Coroners' inquisitions are not relevant to and do not influence the placid deliberations of the Courts of Probate and Chancery. Nor do the Courts in similar cases to this seem to apply, as it should be applied, the principle of circumstantial evidence.—*L.J., 1937, p. 180.*

Gretna Green Marriages.—If, as seems likely, the recommendations of the Committee appointed at the end of 1935 to consider the law of Scotland relating to the constitution of marriage are carried into effect, an end will be made to the extreme laxity which has characterised the formalities, or lack of them, attending civil marriage North of the Tweed. Till now writers on Scots Law have had to distinguish between regular and irregular marriages, the former being preceded by the publication of banns or after notice to the registrar, the latter being the mere indication between the

parties of their intention to take each other as husband and wife. The latter were frequently spoken of as Gretna Green marriages from the fact that in the old days runaway couples from England crossed the Border to this Dumfriesshire village where, in the so-called blacksmith's shop, they exchanged vows. This industry received a severe blow by the passing of Lord Brougham's Act, which enacted that after 31st December, 1856, no irregular marriage should be valid unless one of the parties had lived in Scotland for twenty-one days next preceding the marriage or had his or her usual residence there at the time. There was no particular virtue in the choice of Gretna Green for such marriages; its merit or, perhaps we should say, demerit, being merely its proximity to the Border. It has sometimes been said that Lord Eldon contracted a Gretna Green marriage, but this is inaccurate. It is true that he contracted an irregular marriage in the sense that it was not preceded by the publication of banns, but the ceremony was actually performed by a clergyman in a Haddingtonshire village, and it is of interest to add that the young couple thought it prudent to regularise matters by going through a fresh ceremony in St. Nicholas, Newcastle-on-Tyne. Lord Brougham's Act, it will be observed, did not abolish irregular marriages in Scotland; it is now proposed to do this by permitting civil marriage much on the same lines as in England, that is, by some authorised official after due compliance with the Marriage Notice (Scotland) Act, 1878. Apart from other grave objections to which these irregular marriages were obnoxious, difficulties frequently arose in connection with establishing the proof of their existence.—*S.J., 1937, p. 145.*

Young Delinquents.—In the course of a recent speech, Lord Hewart made reference to the remarkable change which has taken placed in the past half-century in the courts in the direction of humanity, and to the great development in human temper in dealing with persons said to be criminals. Particular emphasis was laid upon the change which is observable in the manner in which young offenders are dealt with. It might be (it was said) that, as some claimed, the tendency to take care of the young had gone too far, but after all there could not be a more grave or appalling problem. In the Court of Criminal Appeal, the speaker continued, it was often revealed that a matured man, sometimes a grey-headed man, who was charged with a very serious offence had been first sent to prison when he was under the age of sixteen years. That was a system not so much for the punishment of crime as for the manufacture of criminals. Allusion was made to difficulties experienced in finding employment by an honest man with a clean record—difficulties which were much greater for a man whose only reference was the prison Governor. Too much could not be done to save the young from the association and contamination of crime. Once a boy entered prison and mixed with those with whom he must mix,

his chances of a decent life were definitely diminished. The learned Lord Chief Justice did not think that all who were concerned with the administration of the Criminal Law in Police Courts, quarter sessions and in the Court of Criminal Appeal could exert themselves too much to save, if they could, the young offender from going to prison for the first time. Patience and perhaps a little imagination were often necessary, and sometimes the expedient of probation. Let them not think, the speaker concluded, that too much was being done, or could be done, to save the young from a life of crime.—*S.J., 1937, p. 205.*

Income Tax: Compromising Claims.—During the hearing of a recent case in the Chancery Division Bennett, J., qestioned the legality of the Income Tax Commissioners compromising claims. It was, the learned Judge said, of importance to know who the persons were who could say to a company "you are relieved of part of your income tax." The commissioners in that case, it was intimated, were giving up a claim against a tax payer to the extent of £ 120, with the possible result that some other taxpayer might have to pay more. In response to counsel's statement that the Commissioners did compromise claims, the learned judge said that he wanted to know what authority they had to free a tax-payer from his liability. Had Parliament given them power to do so? The matter is further best alluded to in *oratio recta* following the report in *The Times*: "Counsel: (Parliament) has given them power to collect the tax. His Lordship: Yes, but has it given them power tot remit it as regards a particular individual? Parliament may have given someone this power. If not I think Parliament only has the right to say so. I don't care how many times it has been done. There is an important point of principle involved. Counsel: The practice of compromising these claims had never been challenged before. His Lordship: It is challenged now. When Parliament says that a tax-payer must pay, can anyone except Parliament say that he need not?" It was suggested by counsel that taxation was payable to the Crown, and the Crown must have power to remit it, but the learned judge expressed doubt on the point.—*S.J., 1937, p. 206.*

Brighter Prisons.—Those enlightened reformers who are so anxious to turn prison into a home from home have gone far, but recent reports from beyond the seas contain the germs of ideas which must be new even to them. First, take Detroit, where a gentleman, suspected of being the executioner of a secret society, awaited trial in a cell so situated that not only could he exchange greetings with a young lady playing a piano in the women's sewing-room, but she could accept his invitation to climb up and see him some time. Here is her tribute to the accommodation: "He certainly had a nice room with a bathroom and radio and every-

thing. Whenever a policeman came through, I ducked behind the shower-bath curtain.'' That leads us to Paris, where a compassionate gaoler ordered the social life of his charges with a truly Gallic discretion, setting aside a cell to be placed at the disposal of prisoners for the reception of ladies who called on them. In the circumstances, it is astonishing that any of his guests should have wanted to escape, but one succeeded in disappearing, and the Court took rather an unfavourable view of the system of hospitality. Perhaps, therefore, our own little Guernsey is the best of all. If recent reports are true, some prisoners have been able, by secret possession of duplicate keys, to walk out at night, going home or even attending dances. But (fine tribute to their temporary abode!) they were always back by morning.—*S.J., 1937, p. 214.*

Sir Harry Trelawney Eve.—Just before we went to press last week the announcement appeared that Sir Harry Trelawney Eve had been made a Privy Councillor on his resignation of the office of judge of the High Court of Justice. Sir Harry was born in October, 1856, and called in 1881. He took silk in 1895, and was appointed to fill the vacancy on the Bench caused by the death of Mr. Justice Kekewich in the year of Queen Victoria's second Jubilee. Some members of the Profession will remember him as one of the very busiest of Chancery juniors. They may recall many a Friday morning in, say, Mr. Justice Chitty's Court when the judge would ask with a twinkle, ''Do you move, Mr. Eve?" and Mr. Eve always did move, having numerous instructions to do so in the Court in question as well as in each of the other Courts in which motions were due to be heard. There was something naval about his gait and fresh-coloured friendliness, and litigation managers showing articled clerks round the Courts for the first time always told them how much time Mr. Eve found for the open air and how he always took his wife and family for their holidays in a caravan, which was then a far more uncommon method of spending a holiday than it has now become. Since those days as a junior, which ended about thirty-five years ago, a long, strenuous and most successful career as a leader and judge has given pleasure to his Lordship and to all with whom he has come in contact professionally, and members of both sides of the Profession most assuredly wish that pleasant activity and happy reminiscence will occupy a period of leisure that has been so thoroughly well earned, and, fortunately for lawyers generally, so long postponed.—*L.T., 1937, p. 201.*

Mr. Justice Simonds.—From the, for the most part, unspectacular nature of their work, Chancery counsel do not as a rule have from the general public the tribute of admiration which often falls to the lot of leaders in Common Law and Divorce practice, but to the individual concerned what matters is the more

discriminating judgment of the Profession itself. The appointment, to fill the vacancy created by the regreted resignation of Mr. Justice Eve, of Mr. Gavin Simonds, K.C., who became in some measure known to the outside public by his share in last year's Budget leakage Tribunal of Inquiry, was far from unexpected and has, needless to say, been heartily welcomed by his former colleagues in both branches, with whom he has for a number of years deservedly had the reputation of a distinguished equity lawyer. The choice of the authorities is an excellent one, too, so far as temperament and personality go. Not the most eager champion of youth on the Bench—and they are many—can cavil at the age at which judges have been appointed of recent years. The fact that the new appointee, in spite of his considerable experience, is still only in the mid-fifties, promises well for the vigorous and successful discharge of what we think and hope will be congenial duties. Mr. Justice Simonds has already taken his place in the Court so long associated with his predecessor, Mr. Justice Eve, on whom, as already stated, has been conferred the honour of being sworn of His Majesty's Privy Council.—*L.T., 1937, p. 201.*

Actio Personalis.—The action against the executors of a dead man, who was in effect charged with gross dishonesty and fraud, has now been determined by a final judgment of Mr. Justice Goddard (*London Assurance, etc.,* v. *Clare, etc., Times, March* 17). The jury could not agree as to whether the deceased wigmaker, whose name and reputation were worldwide, was actually guilty of arson, but they did convict him, long after his death, of having put forth fraudulent claims, which, in the circumstances, is nearly as grave a charge. The deceased artist was not heard. He was not there to defend himself, and to many men it must always seem unsatisfactory that a man who might have been capable of excusing himself should be condemned after death has sealed his lips. The old maxim which killed personal actions with the death of the plaintiff or defendant has recently been expunged from our law, and we are by no means satisfied that the change is wholly for good. Many of our readers only know of the deceased artist by his witty memoirs, which have lately whiled away an idle afternoon for a large circle of Englishmen. Those who have read them will certainly wish that he had been still alive when the recent action was heard.—*L.J., 1937, p. 195.*

Mr. Justice Swift on Divorce Law.—"To my mind the divorce laws of this country are wicked and cruel". So said Mr. Justice Swift at the Birmingham Assizes on Tuesday, stung to righteous indignation at the proceedings in a case before him in which a daughter had been called as a witness to prove her mother's adultery. The Marriage Bill has, we believe, passed through Committee, and those who are in charge of it will doubtless have regard

to the learned Judge's words. Whether Parliament will have regard to them is another matter. For judicial utterances have varied sequels. When divorce was still impossible in England except by Act of Parliament, it was a Judge, Mr. Justice Maule, who, as Sir Edward Parry said in *The Law and the Poor,* "woke up the country to the fact that there was a divorce problem, and that it wanted solving". This was in the case of *Reg* v *Hall,* tried at Warwick in 1845, but Maule, J., used sarcasm and not invective, and the circumstances—it was a bigamy prosecution—allowed that method. "The scorn and irony that Maule poured on the law of divorce roused the public conscience"; and so there was a Royal Commission in 1850 and a Divorce Act in 1857.—*L.J., 1937, p. 195.*

Lord Gorell's Commission.—Some sixty years after *Hall's* case there was another arresting judicial comment on matrimonial law, which seemed likely to produce equally important results, but here expectation has been disappointed. In *Dodd* v. *Dodd* in 1906, Mr. Justice Barnes found himself faced with the immorality due to separation orders, and he delivered a judgment which pointedly called attention to the evil results of the law. The law of divorce and separation, he said, "is full of inconsistencies, anomalies and inequalities, amounting almost to absurdities. . . . Whether any and what remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests"; but he suggested that reform would "enhance that respect for the sanctity of the marriage tie which is so essential in the best interests of society and the State". This led to the Royal Commission of 1909, of which Mr. Justice Barnes, who had then become Lord Gorell, was chairman, but, as is well known, the majority Report of 1912 was frustrated by a small dissenting minority, and the powerful advocacy afterwards of Lord Birkenhead and Lord Buckmaster was unable to prevent this unfortunate result. Will Mr. Justice Swift's criticism have any greater effect?—*L.J., 1937, p. 196.*

More Suggestions for Law Reform.—The perfection of the law is, no doubt, "that far-off divine event to which the whole Creation moves". And if we do not arrive there within measurable time it will not be for want of suggestions. We have had the Business of the Courts Committee, with its four Reports and Lord Wright's thorough-going programme; we have had the King's Bench Commission, with its recent Report, limited to the King's Bench Division because the Chancery Division, somewhat prematurely, perhaps, is assumed to have already reached perfection; we have a new County Courts Act and an infinity of rules, still based, however, on a very limited jurisdiction; and we have the Revision of Law Committee, whose chief attribute is that it works quietly, and therefore gets things done. And now Prof. Eastwood,

of Manchester, is collecting for the *Nineteenth Century* a series of articles on "The Reform of the Law", of which the first, "The Problem of Civil Litigation", by Mr. Colin A. Cooke, appears in the March issue. Mr. Cooke does not start hopefully. "The conditions in which law reform in England can take place are limited and this applies particularly to civil litigation". The three defects are "delay, cost, and precariousness". Sometimes we hear of cases being speedily reached and speedily disposed of; but they are exceptional. As to cost, there is no question; it is the chief reason why the ordinary man does his best to avoid the Courts. By precariousness, we presume Mr. Cooke means the uncertainty of the result. Litigation may mean that the parties are, at the expense of one or the other of them, enabling the Judge to make new law.—*L.J., 1937, p. 196.*

Arbitration or the Courts?—Mr. Cooke tilts also at the length and complexity of legal documents. "I have seen an agreement between two firms in a small matter transformed from one sheet signed by the parties to a formidable document of 20 pages after reference to the law. The parties signed this with the deepest misgivings, each feeling that he had been trapped into indefinite legal liabilities by the other". But it is quite possible that the one sheet contained possibilities of misunderstanding which were avoided by the longer draft. Clients go to lawyers in order that legal snags which they would not themselves foresee may be avoided. In fact, modern drafting aims at the "simplicity and provision only against practical possibilities to the exclusion of improbabilities", which Mr. Cooke wants. As to procedure, he recognises that the King's Bench Commission has made good suggestions, but he doubts whether they would stem the drift from the law, either to arbitration, or to resignation to unjust demands. "They do not meet the fundamental objection of the ordinary man to the legal machine, that what should be a good servant has become a bad master". Mr. Cooke's own remedy is the extension of Commercial Courts to the large provincial towns, in such a manner, however, as not to interfere substantially with the centralised administration of justice in London; and he would meet the drift to arbitration by giving the judges themselves power to hear disputes sitting as arbitrators in Court, within restrictions on outside publication. But a judge can already sit as an arbitrator, and then there is no appeal Mr. Cooke says that there are limits to the utility of the precedent system. There may be, but to abandon it or, whittle it down would increase the "precariousness" of the law.—*L.J., 1937, p. 196.*

Estoppel.—The Judicial Committee have recently decided an interesting point on estoppel and statute law (*Maritime Electric Co. v. General Dairies, Ltd.,* (1937, 1 All.E.R. 748)). The appellants were electrical undertakers in the Province of New Brunswick, and

the charges which they could make for electrical energy were fixed by a law of that Province. The respondents were large consumers and in due course received bills for what was due to the company. These bills were incorrectly made out. The error was serious and one wonders how it was not discovered for over a year; for it resulted in bills being sent in and paid which showed no more than one-tenth of the correct statutory charge. The appellants finally discovered their mistake, sued for proper payment and recovered in both the provincial Courts. This decision was set aside by the Supreme Court of Canada (1935, S.C.R. 519), but has now been restored in Downing Street. Lord Maugham, in giving the decision of the Committee, based himself on a valuable passage in the Hailsham Edition of *Halsbury* (vol. XIII, p. 474), in which the gist of the cases is aptly expressed. Nobody can, by any sort of representation, raise an estoppel which will create a state of affairs which he is legally unable to create. If the law says that an undertaker must charge so much for electrical energy he cannot, by sending in erroneous bills, preclude himself from claiming later what the law declares to be his due.—*L.J., 1937, p. 197.*

A Legal Genius.—Of the small and select band of writers on English Law to whose work the word "genius" could with any accuracy be applied Frederic William Maitland, who passed away twenty-one years ago, "read ere his prime", stood at the very top. Though dead, we may say, he yet speaketh, as is testified by the recent republication or several of his works—Selected Essays, Equity, and Forms of Action at Common Law. These works, his unceasing labours for the Seldon Society, his share in the learned volumes of Pollock and Maitland, all attest his abiding influence in the sphere of law and legal history, and his; unlike the generality of Law books, can be read and re-read time and again not only for professional instruction but, to use Edward Fitzgerald's famous phrase, "for human delight". How he could arouse enthusiasm in his hearers is witnessed to by him who declared that Maitland made you feel that the history of law in the twelfth century was the only thing in life worth living for. To the Year Books, which the ordinary lawyer regards with awe begotten of ignorance, Maitland felt very much as did Serjeant Maynard, of whom we are told that he "had such a relish that he carried one in his coach to divert him in travel, and said he chose it before any comedy." To his wealth of learning Maitland added a keen sense of humour, which he utilised with happy effect to light up some humdrum topic or to poke a little fun at the idiosyncracies of members of the profession, as, for example, when he told us that "Quasi" is one of the few Latin words that English lawyers really love.—*L.T., 1937, p. 229.*

His Humour.—Scattered through the pages of this work on Justice and Police are many shrewed observations touched with

that delicate humour that was one of Maitland's priceless possessions. Thus, in touching on the old ecclesiastical courts he tells us that they did a good deal of business that was not of a very spiritual kind; that in the fifteenth century the suppliants for extraordinary relief addressed their petitions not to the King, as had formerly been the practice, but to the Chancellor, being couched in the humblest tone, asking relief for the love of God and that peerless Princess, his Mother, or for His sake who died on the rood-tree on a Good Friday, and if the Chancellor will give ear his poor petitioner will ever pray for the increase of his good Lordship. The suppliant is poor, old, sick, his adversary is rich and powerful, will bribe and intimidate, or has by accident or trick obtained some advantage of which he cannot be deprived by the ordinary courts. What other writer would have given us those picturesque details which illustrate as nothing else could the grievance of the petitioner and his faith in the power of the Chancellor to set things right. Later the Chancery was not held in such high repute, no one but a Chancery lawyer, according to Maitland, having a good word to say for it; and he points out that Blackstone, though civil to this as to all existing arrangements, reserved all his hymns and laudatory reflections for courts whose procedure was more in harmony with the genius of our nation.—*L.T., 1937, p. 230.*

On the House of Lords.—In his chapter dealing with the House of Lords and the Chancellor, Maitland reminds us of what we are apt to forget, that in the eighteenth century it became customary for the Lords to leave their judicial business to be done by such only of their number as were distinguished lawyers. Occasionally, it is true, the lay Lords, as contrasted with the Law Lords, interfered, and as late as 1844 certain lay members of the House were only with difficulty dissuaded from meddling with some grave questions of law arising out of the trial of Daniel O'Connell; but they were disuaded. In a foot-note he adds this: "On the 9th April, 1883, the case of *Clarke* v. *Bradlaugh,* being before the House, three Law Lords were for reversing the judgment, one for affirming it; Lord Denman, who must be accounted a layman, expressed his agreement with this one Law Lord. (The Times, 10th April, 1883); but this incident does not appear in the journals of the House, and the judgment was reversed without any formal division". To this it may be added by way of foot-note that it would appear to have occurred even late into last century for a lay peer to be called in so that a quorum might be constituted. Earl Spencer in expressing his views in *Re Lord Kinrose,* (1905) A.C. 468, where it was resolved by a Committee of Privileges that a peer is entitled to appear as counsel in an appeal to the House of Lords but not before the House when sitting for the trial of a peer on a criminal charge as the court of the Lord High Steward, reminded their Lordships that when he was a very young peer he

was called in on one occasion so that a quorum might be constituted for the hearing of an appeal. Of course, he did not take any part in the actual decision, although theoretically there was nothing to prevent him doing so.—*L.T., 1937, p. 230.*

BOOK REVIEWS.

THE LAW OF TRADE AND MERCHANDISE MARKS IN INDIA by S. Venkateswaran, D. Sc., Examiner of Patents, Patent Office, Calcutta, with a foreword by the Honourable Sir Courtney-Terrell, Kt., Chief Justice, Patna High Court, 1937. Price Rs. 20.

This is, so far as we are aware, the first treatise on the subject in India. The subject is not one familiar to the ordinary lawyer and there are not even lawyers who have specialised in this branch of law, as in the west. The Law of Trade Marks is bound to be of greater importance in the years to come when this country becomes more industrialized. The lawyers and businessmen alike here owe a special debt of gratitude to Dr. Venkateswaran to have produced amidst his arduous official duties a legal treatise of the first magnitude. The learned author has shown most clearly in the first few chapters how the common law remedy of a passing-off action and a criminal prosecution under the Merchandise Marks Act are cumbersome and expensive in their nature and do not afford a sufficient or speedy protection to the businessman who has been injured in his trade. The difficulty of producing evidence of user and reputation by the plaintiff to establish his title to a trade mark would be easily obviated by enacting and putting into operation a law similar to the one in England by which the production of a certificate of registration provided for by the Act would be *prima facie* proof of title to the trade mark shifting the onus on to the defendants. The learned author puts forward a strong case for legislation on the lines of the English Statute and we agree entirely with the author in his plea. In the later chapters of the work, the learned author deals with the law in India on the subject as it is at present in all its aspects with thoroughness and accuracy. All the cases in England and India on the subject have been referred to in their appropriate places. Then follows a commentary on the Indian Merchandise Marks Act. There are valuable appendices giving all the allied and useful enactments and forms of practical utility. It is the more remarkable that a legal text book of such excellence should be from the pen of one who is not a lawyer by training or profession but a high official in the Patent Office. We are confident that this treatise will be widely used by lawyers and judges and businessmen who have to deal with the subject. To the legislator and the legal reformer, the opening and closing chapters will be of great interest and instruction.

WILLS ON CIRCUMSTANTIAL EVIDENCE by Dr. M. Krishnamachariar, M.A., M.L., Ph.D., seventh edition. Price Rs. 10.

"Wills on Circumstantial Evidence" is a text book of high authority on the subject and passages from it have passed into the judgments of the highest Courts in England and elsewhere as clearly setting out the law on the various points. We are therefore indebted to Mr. Gattie for the seventh edition after nearly quarter of a century of the prior one. The book under review is of special interest to this country as Dr. Krishnamachariar, the well-known writer of books on legal subjects has added copious notes on the corresponding Indian Law below the text of the English edition of the work. Since the publication of the last edition, various statutory enactments and judicial decisions have appeared and they have necessitated the alteration of certain parts of the text. We have no doubt that the book will be welcomed by lawyers and judicial officers in this country.

MUSLIM LAW AS ADMINISTERED IN BRITISH INDIA by Kashi Prasad Saksena, M.Sc., LL.B., with a foreword by Sir Saiyid Wazir Hasan, Ex-Chief Judge, Chief Court of Oudh, Lucknow, 1937. Price Rs. 14.

This is a most comprehensive treatise on the Muslim Law. The learned author has the advantage of having been a Professor of Law in Cawnpore which would have enabled him to study its juristic aspects, in addition to being a practising advocate. The learned author has in this work given an exposition of the Islamic system of law from a comparative, analytical and juristic point of view. The subject has not been dealt with in a codified form, a method which is adopted in some of the modern text books which though it may clearly set out the propositions of law will not bring out their history or the reason underlying them. On the other hand, he has adopted the method of a running commentary on the subject interspersed with discussions of basic principles on which the law has been founded. He has had the advantage on various points of the suggestions of the great Muslim Judges in Northern India. Such as Sir Shaw Sulaiman and Sir Wazir Hasan, the latter of whom has contributed a foreword to the work and has said that the work has been compiled with thorough research and keen insight into the principles of Muslim Law and that it is thoroughly reliable. He suggests that it will occupy an eminent position among the treatises on Muslim Law. He has compared it favourably with that of the great work of the late Mr. Ameer Ali on the subject which however was written many years ago. With such high praise, we are sure that the book will be found invaluable as a treatise on Muhammadan Law by lawyers and Judges.

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THE METHODS OF BRITISH JUDICIAL INTERPRETATION OF HINDU LAW SOURCES.

BY

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III

During the long period which is covered by the Development of Hindu law through the instrumentality of the Smritis and the commentaries, we find that there are certain practices and rules which were once sanctioned by the Smritis and even much earlier, by the Vedas, but which have become obsolete or are no longer approved by public opinion and thus not enforced. The commentators, in explaining this phenomenon, have given two reasons. They have relied on the text of Yajnavalkya:

"A rule of conduct, though according to Dharma, should not be followed if it is opposed to public opinion and not conducive to heavenly happiness".

The second was that some of the Puranas have prohibited these rules from being enforced in the Kali age. In discussing the rule about unequal partition, which has become obsolete, the Mitakshara relies on the text quoted above and refers to other instances of rules of Smritis and Vedas, *viz.*, the killing and cooking of either a bull or sheep for the feast of a Srotriya and the Vedic injunction of sacrificing a cow as an offering to Mitrāvaruna, which are no longer enforced for the same reason. The Brihan-naradiya purana gives also the other following instances, *viz.*, sea-voyage, the carrying of a water-pot, the marriage of a twice-born with other castes, the practice of Niyoga, the offering of flesh in Sraddhas, the third Asrama among the four Asramas ordained for every individual, *i.e.*, Vanaprastha or retirement to a forest, the giving of a daughter once given in marriage, being still a virgin, to another, Brahmacharya for a long period, man-sacrifice, horse-sacrifice going on a long pilgrimage with intent to die, and cow-sacrifice. The

Aditya Purana, as quoted by Raghunandana in his Udvāhatatva, a treatise on marriage, quotes these instances and adds one or two more, *viz.*, the recognition of sons other than the Aurasa and the Dattaka, among the 12 kinds of sons referred to by Manu, the participation by a Brahmin of food prepared by a Sudra. A full list of the practices which once obtained but were later prohibited as Kalivarjya can be collected from the quotations found in the Smritichandrika, Hemadri, Parāsara Mādhavīya, and Nirnaya sindhu and Prof. Kane in his learned paper to the 8th All-India Oriental Conference published in the Journal of the Bombay Branch of the Royal Asiatic Society has given in an appendix all the verses so collected. (J.B.R.A.S., Vol. 12.) From a perusal of that list we find the following additional practices prohibited in modern times, (1) partaking of wine even in the Sautramani sacrifice; (2) the curtailment of *Asoucha* or death pollution to one day in the case of men of Vedic learning; (3) the permission to a Brahmin householder to take cooked food from Sudras if they are his Dasas, cowherds, hereditary friends, persons cultivating his lands on agreement to pay part of the produce. It may be noted that this permission and the rule of one day Asoucha are found in Parāsarasmriti which is said to be the prevailing Smriti for the Kali age. The fining of witnesses who depose to a dispute between father and son which was prescribed in the Sāhasa chapter of the Yajnavalkya Smriti (II, 239) is also prohibited. When we consider the fact that even the practices permitted by the Parāsarasmriti are prohibited as forbidden in the Kali age, we should conclude that the reference to the Kali age is not strictly correct but is only a way of saying that it is forbidden in accordance with the opinion of the times in which these verses were written. The expression 'forbidden in the Kali age' is only a convenient formula for saying it was opposed to the 'current public opinion'. For, it is said, they were prohibited in the beginning of the Kali age for the protection of the people. The Aditya Purana gives a reason for the authority to prohibit these practices, which are allowed by the Smritis. It says that:

"The decision of the virtuous has like authority with the Vedas".

This is inconsistent with the theory of the Mimamsakas about the relative authority of the Vedas, the Smritis and the conduct of Sishtas. The Puranas also cannot be considered to be of equal authority with the Smritis and it is difficult to hold

that, especially in legal matters, the Puranas can be an authority at all. The text of Vyasa clearly says that:

"When there is a conflict between the Sruti, the Smriti and the Puranas the Sruti must prevail and that in a conflict between the latter two the Smriti must prevail;"

According to tradition Vyasa is said to be the author of the Puranas. Hence we have here his own declaration (assuming that the two Vyasas are one and the same person) that the Puranas are of inferior authority. Further it has to be noted that the Puranas above referred to, *viz.*, the Brihannaradiya Purana and the Aditya Purana, do not rely on their own authority for the prohibition of these practices, but on public opinion and the conventions of the virtuous. If the theory that the rules of the Smritis were rules of law in as much as they were enforced by Courts of Justice in ancient India is accepted, it will easily account for some of these practices sanctioned by the Smritis not being enforced. When they are opposed to public opinion or rejected by the conventions of the wise, the Courts of Justice which are keenly alive to public opinion no longer enforce them, by applying them in the decision of cases. The British Courts have also, following the same principle, refused to enforce some of the rules, *viz.*, the rule relating to unequal partition, Niyoga, the practice of the recognition of sons other than the Aurasa and Dattaka, the appointed daughter and the recognition of inter-caste marriages. In *Munni Lal* v. *Shiama Sonarin*[1] and *Padam Kumari* v. *Suraj Kumari*[2] the Judges observe that whatever might have been the case in ancient times as shown by old text-books, the marriage of a Brahmin with a Kshatriya is not a lawful marriage at the present day. By parity of reasoning it may be argued in the case of some of these rules at least that, if public opinion is in favour of reverting to the old practices allowed by the Smritis, Courts of law may recognise them. Especially in the case of inter-caste marriages it may be legitimately argued that the stricter rule of prohibiting these marriages and holding them to be invalid may be relaxed in accordance with the law of the Smritis. Manu clearly recognises them, and Yajnavalkya, though not in favour of a Brahmin marrying a Sudra woman does not hold inter-caste marriages generally to be invalid and prohibited by the Sastras.

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1. (1926) I.L.R. 48 All. 670. 2. (1906) I.L.R. 28 All. 458.

But the British Courts of Justice, in accordance with their idea that the commentaries and digests are records of existing usage and as such the law is to be ascertained from them and enforced accordingly, are unable now, apart from legislation, to recognize them.

There is also the phenomenon that even after the date of the Mitakshara some of the rules sanctioned therein are not followed such as the right of females to share on partition. It is no longer enforced by Courts. (Vide *Subramanian Chetti* v. *Arunachelam Chetti*[1].)

As regards the authority of the Puranas, Mr. Sarkar Sastri in his 'Hindu Law' states as follows:

> "With respect to their authority in matters of positive law Prof. Wilson rightly observes that the Puranas are not authorities in law. They may be received in explanation or illustration but not in proof. It should be observed that the doctrine of prohibition in the Kali age of certain practices which are authorised by the Smritis is enunciated in some of the Upa-Puranas and cannot therefore be entertained by our Courts, if the Puranas are not authorities in law".

That the Puranas may also be referred to as the material sources for Dharma is mentioned by Yajnavalkya (I, 3). He mentions generally Purana and the Mitakshara in its commentary elucidates it as the Brahmapurana and the like, which will include all the eighteen Puranas. It has also to be recognised that some, at least, of the Puranas are as ancient as the Smritis. There is a clear reference to a Sloka of the Bhavishyatpurana in Apastamba's Dharma Sutra. (*Vide* Apastamba Dharma Sutra, II, 24.) There is also another reference to a Purana in Apastamba Dharma Sutra, I, 1-a, which is said to be a Puranasloka by the commentator Haradatta. In Manu there is a reference to stanzas sung by Vayu said to be recited by "Puravith" in which it is said that the seed must not be sown on that which belongs to another. This evidently refers to some old Puranasloka. The Naradasmriti quotes two slokas in dealing with the law of debts from a Purana. In Tantravartika by Kumarila Bhatta reference is made to Puranas along with the Dharmasastra as authorities on Dharma. There is also reference to some of the Puranic incidents in Manu in Chap. IX when discussing the practice of Niyoga. Manu says this practice which is reprehended by the learned among twice-born

1. (1904) I.L.R. 28 Mad. 1.

as fit for cattle, is said to have ruled among men in the days of King Vena. According to Puranic tradition Vena was the son of Prithu who was a godless king and ordered that sacrifices ought to be made to him and not to the gods. (*See* Bhagavatapuranam). He is said to have been responsible also for the confusion of castes. Since that time, Manu says, the Virtuous have censured the practice of Niyoga. As an instance of the appointed daughter, Manu in IX, 128, refers to the daughter of Daksha. In many of the Puranas there occur chapters dealing with the contents of the Smritis. The Agnipurana has appropriated the Vyavahara portion of Yajnavalkya in Chapters 253 to 258. Still, on the whole, we have to come to the conclusion that in regard to Vyavahara or Law proper, the contents of the Puranas are very meagre. In the decisions of British Courts there are occasional references to the authority of the Puranas in matters of Positive law. In *Ganga Sahai* v. *Lekhraj Singh*[1] in discussing the question whether an adoption made after the adoptee has completed the fifth year is valid reference is made to a text of the Kalika Purana quoted by the Dattaka Mimamsa of Nanda Pandita. But in that case it was held that the passage in the Kalika Purana was not proved to be authentic. Mr. Justice Mahmud at p. 289 observes:

" Somewhere in the order of precedence, either between the Srutis and the Smritis, or more probably after them, come the Puranas, which the celebrated Colebrook states, are reckoned as a supplement to the scripture, and as such, constitute a fifth Veda; and this view is supported by a passage of the sage Yajnavalkya, which lays down that 'the Vedas, along with the Puranas, the Nyaya, the Mimamsa, the Dharma Sastras and the Angas are the fourteen seats of knowledge and duty'."

In *Venkatachellam Chetti* v. *Audian*[2] Mr. Justice Muthuswami Aiyar referred to the Danadharma chapter of the Mahabharata as an authority for holding that the widow succeeding to the separate property of her husband had not an absolute estate. But there are difficulties in holding the Puranas to be material sources of Hindu law. The texts are often not reliable and are in many places obscure. Not avowedly intending to lay down rules of positive law, they are not also very accurate or precise. Except in the sense of reflecting the changes in public opinion from time to time and as also being used as instruments for effecting changes in the Smriti law according to changed conditions, it must be said

1. (1886) I.L.R. 9 All. 253. 2. (1881) I.L.R. 3 Mad. 358.

that the Puranas have very little authority in regard to positive law. The tendency of the digests of more recent date to rely on passages of the Puranas cannot obtain judicial recognition, and Courts have to curb the temptation to search for rules of law in these voluminous Puranas which are not proof against interpolations and emendations.

Custom has two means (1) actual practice; (2) usage having the force of law.

The next important subject is the judicial interpretation of custom as a source of law. In the jurisprudence of all countries custom plays an important part as a source of law. There are two ways in which custom operates as a source of law. With certain well-defined characteristics such as antiquity, uniformity, notoriety and definiteness, it must be given effect to as a source of law, even though it may be at variance with the general law of the country. Secondly, custom itself or approved usage constitutes the law in certain departments of legal relations such as the law merchant or commercial usages or land tenures, or the customary rights of irrigation between the State and ryots in India or the usages of Religious Endowments, where the only criterion is the tacit conventions of the people in regard to these matters. The former may be sub-divided into three groups, local customs, family customs and caste customs. From the beginning, the Smritis have recognised custom as a supplementary source of law, in the well-known references to Jati-dharma, Kula-dharma and Desa-dharma.

Vide Manu, Chap. VIII, S. 41.

A King who knows the sacred law, must enquire into the laws of castes, districts of guilds and of families and settle the peculiar law of Each.

Vide Manu, Chap. VIII, S. 46.

What may have been practiced by the Virtuous, by such twiceborn men as are devoted to the law, that he shall establish as law, if it is not opposed to the (customs of) countries, families and castes.

Dutt's translation. Manu, Chap. VIII, S. 46.

Whatever has been done by good men or whatever has been practised by virtuous Brahmins should be regarded as valid if these be not contrary to the laws and usages of their country, the king shall give judgment in conformity therewith. Manu treats both kinds in one

verse and both Kullukabhatta and Medatithi expressly say that they should not be opposed to the texts.

A text of Gautama says:

"Local, tribal and family customs, if not opposed to express texts are binding as law."

The latter kind of custom is also recognised as Sreni-Dharma, Naigama or Gana Dharmas. (*Vide* Yagnavalkya, II, 192). Apart from these two aspects of custom as a source of law, so far as the Smritis are concerned, there is no third aspect of custom as source of law. In the administration of the personal law of the Hindus by British Courts customs have been recognised as the only source of law in the case of the Nairs of Malabar and the Kanarese people of South Kanara and some of the agricultural tribes of the Punjab (vide *Ramkishore* v. *Jainarayan*[1]) and the Hindu law has not been applied to them. As already mentioned by me in the previous lectures, in the beginning of the administration of Justice by British Courts an attempt was made to hold that the Hindu law did not apply at all to the Tamil populations of Southern India and the aboriginal Dravidian tribes; and it was said that the rules of the Hindu law must be applied only in so far as they have been accepted as customs by these communities, and wherever these customs differed from the Hindu law, they must be recognised and enforced by the Courts as such, for it must be taken that in the process of Hinduization they must have retained some of their non-Hindu customs. This third aspect, I have already shown, is unknown to the Smritis. The theory that the Schools of Law in the different provinces such as the Bengal School of Dayabagha, the Benares School, etc., are based on the usage of the particular interpretation of Texts, obtaining in those provinces is also unknown to the Smritis and Commentaries. In discussing this subject of custom as a source of law almost all the great writers on Hindu law have always referred to the word 'Achara' occurring in the Hindu law texts as meaning custom having the force of law. Manu refers to the Sadachara of Sadhus as an authority of Dharma and similarly Yajnavalkya and other Smriti-writers. From this the conclusion is drawn that in Hindu law custom outweighs the written text of the law. Sometimes it is said that custom is the

1. (1921) 42 M.L.J. 80: L.R. 48 I.A. 405: I.L.R. 49 Cal. 120 (P.C.).

primary source of law. But it has to be observed that this is an idea remote to the minds of the Smriti-writers. Whenever they referred to Sadachara as an authority for Dharma, it was only as a determining factor in the case of matters of detail in which there are no specific rules of law to be found in the Smritis or where the interpretation and application of any existing rule of law is doubtful. By Sadachara they did not mean custom in the legal sense as distinct from the general law. The text of Vasishta clearly lays down:

> " That is Dharma which is ordained in Sruti and Smriti. When both are silent the Achara of the well-behaved (Sishtas) should prevail."

Medhatithi, the commentator of Manu, makes this clear by saying that wherever the Sruti and the Smriti are silent, the conduct of those who are learned in the Vedas is also an authority; and as an instance, he gives kankana-bandhana or the tying of the kankana in a marriage. Kulluka says:

> " By Achara is meant modes of dress, etc."

Mandlik in his introduction to the Vyavahara Mayukha, at pp. 94-96 quotes certain authorities which, he says, indicate the pre-eminence of custom and usage in the Hindu law. With the greatest respect to him we have to say that the exact significance of the quotations had been misunderstood by him.

In the quotation from the Mitakshara लोकसिद्धस्यैवानुवादकान्येव प्रायेणास्मिन्प्रकरणे वचनानि (the texts in this section, *i.e.*; on succession and partition, are mostly reiterations of what actually prevails in the world), the phrase *Lokasiddha* does not mean custom at all. It is used in contradistinction to Sastrasiddha. It means 'what pertains to the world of perception', while Sastrasiddha means 'what obtains only in Sastras'. This sentence is put in by Vijnanesvara for the purpose of refuting the argument of another commentator that the phrase पितृद्रव्याविरोधेन qualifies every kind of wealth, as otherwise, in the case of wealth obtained by friendship it will become partible on the authority of a text. Vijnaneswara says that this is really unnecessary for these rules need not be construed like the rules of Sastras, but like those which deal with the facts of the world. Similarly in the quotation from Viramitrodaya the word *Lokasiddha* has been misunderstood. As for the two quotations from Brihaspati, they only establish that Achara or charitra, where the text is silent, is one of the sources of

Dharma. It must also be noticed that by charitra is meant documentary evidence. (*Vide* Brihaspati's text चरित्रं पुस्तकरणे ||). The other quotation from Devala only establishes that the usage of a country should be respected. The quotations from the Mahabharata alone seem to indicate that usage is superior to the Sastras. But this is not an authority which can be recognised when the Smritis are clear that customs are inferior to the Smritis in authority. Hence it is that the authority of Achara is based, according to the Mimamsaka, upon the fiction of a Smriti rule or a Vedic injunction. Where the Vedic or the Smriti rule is clear, such a fiction cannot be relied upon and the custom can be no authority for the Dharma. Hence no Achara can ever be recognised which is opposed to the Veda or the Smriti. In regard to the recognition of Desa Dharmas, therefore, the Mimamsaka experienced a difficulty, for the assumption cannot be made of a Vedic injunction limited to a certain locality, as the Mimamsaka considers the reference to the people of a locality as indefinite, because all persons who come to the locality and live there may not follow the custom of the locality of their origin. Hence such a vague and indefinite custom cannot be imported in the fiction of a Vedic rule. But in regard to a family or caste custom a limited Vedic or Smriti rule may be assumed. From the foregoing it will be clear that customs relating to a class family or locality which are opposed to the specific rules of the Smritis would not have been enforced in ancient India by the Courts of Justice then. As has been already referred to, Gautama clearly says so, *vide* also the approval of Bodhayana referred to for the custom of marriage of maternal uncle's daughter in Southern India by Balambhatta. It must be also remembered that the Kula and the Jati which formed the lowest Courts in ancient India for the decision of cases in the gradation of Courts of Justice in the land were subordinate to the King's Courts. Of course, in all matters where there is no specific rule of the Smriti governing the question or in matters where the rule is doubtful or where the application of the Smriti rule has to be made on proper interpretation or in matters where the Smriti itself recognised the Jati-dharma, Desa-dharma and Kula-dharma as the deciding factor, Custom or approved usage was a source of law, and it is in this sense that the Yajnavalkya Smriti

defined a judicial proceeding as a complaint in regard to the violation of a rule of Smriti or Achara. This recognition of family, caste or local customs is peculiar to the jurisprudence of British India, for as has been pointed out by their Lordships of the Privy Council in *Abdul Hussein Khan* v. *Sona Dero*[1], "custom binding inheritance in a particular family has long been recognised in India although such a custom is unknown to this country (England) and is foreign to its spirit." The only analogy their Lordships could find was customs affecting descent or rights of inhabitance of a particular district. But even there the law in India is different from the English law. According to the Indian law inhabitants of a particular district even though they may reside outside the district may follow the customary law. (*Basant Singh* v. *Brij Raj Saran Singh*[2].) In England if the alleged custom is proved to be enjoyed by people outside the district, the custom of the district will fail. (Vide *Abdul Hussein Khan* v. *Sona Dero*[1].) In *Narasammal* v. *Balaramacharlu*[3], where the custom of the adoption of a sister's son was set up in a Brahmin family of the Telugu country Mr. Justice Holloway held that such a custom cannot even if proved to exist, operate in a Court of Justice bound to administer the law. "More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself the logical deduction from the very mature of the subject to which it applies." The effect of this judgment is that where there is a clear prohibition of Hindu law, no custom can be set up in derogation of it. Mr. Justice Holloway added one other limitation which has been disapproved by text-writers and later decisions, *viz.*, that judicial recognition is necessary before a custom can be set up. He observed, 'No custom how long so ever continued, which has never been judicially recognised can be permitted to prevail against distinct authority. In *Tara Chand* v. *Reeb Ram*[4] it was held that a custom in a single family for three generations cannot be set up as against the general law to which the family was subject. This is not customary law according to Roman jurisprudence. In *Virayya* v. *Hanumanta*[5] it was argued on the strength of usage that the adoption of the father's brother's son is not valid but His Lordship Justice Muthuswami Aiyar

1. (1917) 34 M.L.J. 48: L.R. 45 I.A. 10: I.L.R. 45 Cal. 450 (P.C.).
2. (1935) 69 M.L.J. 225: L.R. 62 I.A. 180: I.L.R. 57 All. 494 (P.C.).
3. (1863) 1 M.H.C.R. 420. 4. (1866) 3 M.H.C.R. 50.
5. (1891) I.L.R. 14 Mad. 459.

refused to engraft a rule on the Hindu law as evidenced by usage. But the tendency sometimes of the Courts to give legal force to customs which have not been proved to be ancient, definite and uniform on the supposed idea that the communities which set up the custom have never adopted the Smriti law or the Brahmanical law in its entirety is too great and unwarranted a dilution of the strict legal incidents of a custom. In *Mooka Kone* v. *Ammakutti*[1] the Full Bench of the High Court of Madras had to consider a question whether the Madura Yadava community can set up successfully a custom by which the widows of a deceased last male owner dying without issue were excluded from inheriting to his estate but his nearest Dayadis inherited his estate to the exclusion of his widows. It was held that such a custom in derogation of the Hindu law was not made out as the strict conditions of a custom were not proved and that unless these conditions are strictly satisfied, it is impossible to set it up against the general Hindu law which applies to the community. Mr. Justice Kumaraswami Sastri observed:

> " I think it is too late in the day to contend that in the case of persons professing the Hindu religion, the Hindu law as expounded in the Smritis and commentaries prevalent in the province in which disputes arise should not *prima facie* govern the parties, though it will always be open to show that such Hindu law has been either modified by custom or that the rules have not been adopted by the community who retained in that respect their original customs."

Mr. Justice Devadoss strikes a different note in considering the legal requirement of the proof of a custom at variance with the Hindu law. He says:

> " The Court should not labour under the impression that the custom pleaded is a conscious departure from or variation of the Hindu law applicable to the parties. The custom is not an exception to the general Hindu law as if the set of persons who were governed by the Hindu law agreed to adopt a course of conduct in variance with the law which governs them."

He proceeded on the supposed general doctrine that the community belonged to the Dravidian race who were never governed by the Hindu law. These observations, as I have already pointed out, open the door to the condemnation of the Judicial Committee in *Bhagwan Singh* v. *Bhagwan Singh*[2] already quoted by me in my first lecture and in the face of the Judicial Committee's observations it is difficult to say that Justice Devadoss's opinion is correct. Mr. Justice Wallace,

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1. (1927) 54 M.L.J. 174: I.L.R. 51 Mad. 1 (F.B.).
2. (1899) L.R. 26 I.A. 153 at 165: I.L.R. 21 All. 412 (P.C.).

on the other hand, observes:

"They are certainly Hindus by religion. That being so, it is difficult for them to contend that they are not in the matter of the family law of inheritance governed primarily by Hindu law. They plead the suit custom which is a custom in derogation of the ordinary law of succession under Hindu law as a custom among them having the force of law and therefore to be enforced by the Courts. The onus of proving such a custom lies heavily on the defendants, and it is necessary for them to prove that the custom alleged is certain, uniform and ancient, and forms in the caste consciousness such a binding rule that disobedience of it will be felt by their castes as tantamount to disobedience of a positive law."

So early as *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*[1] the Judicial Committee laid down the same rule. They observe as follows:—Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India. But it is of the essence of such usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential thay they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the antiquity and certainty on which alone their legal title to recognition depends.

That a family custom if it is modern and cannot be called immemorial usage, cannot be binding was held by the Privy Council so early as *U. Chowdhry* v. *G. Chowdhry*[2]. The same rule was also enunciated by the Judicial Committee in *Hurpurshad* v. *Sheo Dyal*[3] thus:

"A custom is a rule which in a particular family or in a particular district has by long usage obtained the force of law."

It must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly

"These are in every system of jurisprudence the recognised principles of a custom having the force of law and therefore recognised by the Courts as governing the parties in any dispute."

In this view the observations of Sir Gurudas Banerji in his treatise on the Law of Marriage are not correct. He says:

"We may at any rate fairly say that in the Hindu law not only is it unnecessary to trace back the existence of a custom to any definite date, but even the indefinite condition of being ancient may in favour of some classes of customs have to be dispensed with. It certainly seems unreasonable thus

(1872) 14 M.I.A. 570. 2. (1870) 13 M.I.A. 542.
3. (1876) L.R. 3 I.A. 259 (P.C.).

to fetter the growth of customs which are encouraged by the Hindu law and which are the means by which that law can be adapted to modern requirements".

These observations cannot be readily accepted in view of the decisions of the Judicial Committee and are also opposed to the principles of the Smritis. In *Martand Rao* v. *Malhar Rao*[1], Lord Sinha delivering the judgment of the Judicial Committee in discussing the question of a special custom of impartibility and primogeniture in respect of a zamindari held that only an estate of considerable age can be considered governed by an ancient and invariable custom and an estate of which the origin dates back only to 1796 cannot be regarded in a settlement in 1863 as governed by an ancient custom. The only workable rule under modern conditions is to apply the Hindu law to all Hindus by religion and to enforce customs in derogation of that law only if they satisfy the requirements of a valid custom having the force of law. If changes are required by a considerable body of public opinion in the Hindu law itself, the only method is to effect it by legislation. But it will be subversive of all progressive notions of administration of a legal system to entertain nebulous theories of the applicability of the Hindu law itself to different sections of Hindus—theories erected on the shifting sands of ethnological data. On the other hand, the wholesome influence of Judge-made law should be directed to bring uniformity and certainty to the application of legal rules and be chary of the recognition of all kinds of customs.

The Smritis in their course of development covered a fairly long period of nearly ten centuries and inevitably therefore in the administration of the Hindu law during that period various changes have been introduced in the law, and it would really be an interesting study to pursue the history of the development of the Smriti law from the time of the earliest Smritis and the Sutras to the most recent of them; but it is beyond the scope of the present lectures. It is not right to conclude, as Sir Gurudas Bannerjee does, that usage or custom has been the instrument by which these changes have been effected. Just as the history of legislation in a modern state for a few centuries will reflect the changes of public opinion, so the various Smritis which sprang up from time to time

1. (1927) 54 M.L.J. 397: L.R. 55 I.A. 45: I.L.R. 55 Cal. 403 (P.C.).

reflect the changes of public opinion and the adaptations of the law to the conditions of the times. It is not necessary therefore to assume that this has been done by the force of usages developing in course of time. From what Manu says about the practice of Niyoga in Chapter IX one will note that it is not because of any usage which has modified the ancient rule of Niyoga, that Manu would prohibit it but on the strength of his opinion supported by enlightened public opinion. In verse 64 he clearly states:

"A widow must not be appointed to cohabit with any other (than her husband)"

And in verse 68 he states:

"the virtuous censure that man who in his folly appoints a woman whose husband died, to bear children to another man".

This appears more like the enunciation of a new rule of law prohibiting Niyoga in accordance with his opinion and as reflecting the views of cultured men than the mere recording of a usage against the practice of Niyoga which has grown up and which has attained the force of law. Similarly in the Yajnavalkya Smriti the marriage of the twice-born with Sudra women which was permitted by Manu and other Smritis anterior to him is condemned (*vide* II, 56). He expressly states 'this is not my opinion.' Many more instances may be quoted from the Smritis in support of the above statement.

During the period of the digests all the Smritis were looked upon as constituting one material source of Hindu law and chronology was entirely ignored, and the various digest writers tried to deduce the rules of law by a process of interpretation and reconciliation of different texts, and in this they differed among themselves. Hence arose the different schools of law in the various provinces now recognised by the British Courts. The introductory portion of the Sarasvati Vilasa clearly shows the difficulty that was experienced on account of the conflicting opinions of the commentators, and hence, it is stated, King Prataparudradeva arranged for the establishment in a book of clear rules of law.

Mr. Justice Holloway observed in *Narasammal* v. *Balaramacharlu*[1] that:

"A very short experience will suffice to satisfy any Judge that a Pandit will always overcome a passage of Hindu law too stubborn for other manipulation by the often baseless allegation of custom".

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1. (1863) 1 M.H.C.R. 420.

This is really a misunderstanding of the practice of commentators in attempting to reconcile two conflicting texts or interpreting a doubtful text to refer to the public opinion expressed by conduct of cultured and learned men as supporting their conclusion. For this they use the word 'Achara'. This is not the setting up of any custom having the force of law contrary to a written text. It is really the opinion expressed by the conduct of the wise who are versed in law and Aryan culture which is relied upon as a determining factor to support their conclusion. As the commentator has no authority apart from the text he is commenting on and other texts of equal authority, which he is quoting, he is diffident of relying on his own interpretation as conclusive and seeks for support the opinion of the wise as expressed in their conduct when observing the rules.

The British Courts, in accordance with the great importance which they gave to custom and usage, developed the tendency to judicially recognise the many varied customs which cropped up their head during the period of Mahomedan rule, owing to the absence of the regular administration of Hindu law by the King's Courts. This tendency is specially seen in the recognition of the many customary modes of marriage by the Courts of British India. While the tendency during the period of the administration of Hindu law by Hindu Kings was for the different kinds of marriage to drop out and the higher form of marriage, *i.e.*, the Brahma form to become the more prevalent one, during the period of the British administration of the Hindu law, the kinds of marriage began to increase and many customary modes of marriage came to be recognised by the British Courts. Though originally the Brahma form was not applicable to the Kshatriya and other castes, it later became the prevalent form of marriage among all castes including the Sudras so that according to decisions the presumption is that it is in the Brahma form. While on the one side it was so, the decisions began to recognise various customary forms of marriage such as the Phul Vivaha among the Orissa Rajas, Dand marriages among the Raj Vamsies of Bengal, Santi grihita marriage among the Tippara castes, the Sarvasavadhana marriage among the Nambudris of Malabar. (*Vide* also other kinds of marriage given in Mandlik's Hindu Law, pp. 418-425.) In some of the later digests such as the

Dharmasindhu and the Samskara Kaustubha the opinion is expressed that in respect of marriage, usage should be followed. For this reliance is placed on Asvalayana Grihya Sutra, where it is stated:

"The usages of the country should be followed in marriages".

And on the text of Manu:

"that the path of the virtuous should be followed by which one's father and forefathers have gone. No sin will arise out of that".

But there is no indication of this exceptional rule in regard to marriages in the Smritis.

During the period of British administration the formation of new sects like Brahmos led to their marriages being recognised. They are strictly monogamous and performed according to the rites of the Brahmo Church, the new Samhita as it is called in *Sonaluxmi* v. *Vishnu Prasad*[1]. Statutory marriages as under the Special Marriage Act, 1872, and Sikh Marriages under the Anand Marriage Act, 1909, are also recognized.

In the application of the rules of the Smritis the British Courts have adopted the principle of (1) determining whether a text is merely directory or recommendatory, and (2) the doctrine of *factum valet*. In *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*[2] the question arose as regards the validity of the adoption of a distant Sapinda in preference to the brother's son on the ground that the Smritis were a mixture of religion, law and morality. The Judicial Committee held that the rule of the Dattaka Mimamsa giving preference to the brother's son, is only directory and the adoption is not invalid. In the case of an adoption of an only son the question of its validity led to serious controversy among the various High Courts. But the Judicial Committee in *Gurulingaswami* v. *Ramalakshmamma*[3], decided that the text of Vasishta was only directory so far as the adoption of an only son was concerned. Similarly the texts prohibiting marriages with the daughters, of one's guru or with girls having hideous names or brotherless girls have been held to be merely directory. In the case of Yajnavalkya's text on marriage referring to the necessity of the girl being अरोगिणी and भ्रातृमती, the Mitakshara enunciates the directory character of it and says that even if she is suffering from disease and brotherless, she becomes the legal wife

1. (1903) I.L.R. 28 Bom. 597.
2. (1878) L.R. 5 I.A. 40: I.L.R. 3 C. 587 (P.C.).
3. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113: I.L.R. 22 Mad. 398 at 425 (P.C.).

भार्यात्वे उत्पन्ने and in the case of Sapindas, Samanagotras and Samanapravaras the Mitakshara says she does not become a wife at all भार्यात्वमेवनोत्पद्यते. So also the marriages of a step-mother's sister, paternal uncle's wife's sister, wife's sister or their daughter were held valid as the texts prohibiting such marriages were held to be directory only. (*Raghavendra Rao* v. *Jayaram Rao*[1] and *Sri Rajah Vellanki Ramakrishna Rao* v. *Subbamma Rao*[2]). In *Raghavendra Rao* v. *Jayaram Rao*[1] for holding that the text is hortatory reliance is placed on Kullukabhatta's remarks on Manu's text relating to the selection of a bride, (II, 6-11) that violation of none of these rules affects the legality of the union. But in his commentary on verse 5 his remark was that the girl must be supported as a mother. As a guide to the interpretation whether the text relating to marriage is directory or not, the rules as to desertion of the girl and the observance of penance for entering into the prohibited alliance would indicate that the marriage is invalid; and if they are absent, then in such cases the marriage is valid and the texts relating to them are directory only. Similarly, the prohibition not to marry a second wife except in certain cases has also been held to be directory only in *Viraswami Chetty* v. *Appaswami Chetty*[3]. So far as the judicial decisions are concerned, no rules of interpretation have been laid down save the dictates of common sense by which a text is to be construed as directory or otherwise on the supposed principle of mixture of religion, law and morality. In the case of the text relating to the adoption of an only son, the rule of the Mimamsa contained in the Hetuman-Nigadadhikarana was suggested as furnishing a safe guide. But the Judicial Committee has not pronounced upon the application of this rule except saying that it may be fairly argued. (*Gurulingaswami* v. *Ramalakshmamma*[4].)

The doctrine of *factum valet* which is a doctrine of the Roman Civil Code has been applied to Hindu law, especially in the law of adoption and marriage. It is said to have its foundation in the Hindu commentaries especially in the Dayabhaga. The well-known sentence वचनशतेनापि वस्तुनः अन्यथाकरणाशक्तेः ||

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1. (1897) 7 M.L.J. 134: I.L.R. 20 Mad. 283.
2. (1920) 39 M.L.J. 183: I.L.R. 43 Mad. 830.
3. (1863) 1 M.H.C.R. 375.
4. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113: I.L.R. 22 Mad. 398 at 425 (P.C.).

"a thing or the nature of a thing cannot be altered by a hundred texts", which occurs in the portion of the Dayabhaga relating to the question of the power of alienation of immovable property by a father with the consent of his sons is referred to by Hindu law writers and by decided cases as the Hindu law counterpart of the doctrine. The sentence referred to is well-known throughout Sanskrit religious and philosophical literature and its meaning as understood by Sanskritists is that what exists in the world and is proved to exist by perception cannot be altered by a hundred texts. The familiar illustration given is that any number of texts cannot hold that fire is not hot or that a pot is really a cloth. From this the purport of the sentence is clear. It is difficult to see the connection between this and the doctrine of *factum valet*. The relevancy of the reference to this Sanskrit maxim by Jimutavahana is readily seen. The power of the father over the immovables is a well-known fact of experience and any number of texts cannot do away with the power which he possesses, for in a family, by the very nature of his being the father, he is powerful and can deal with the property as he wishes, even contrary to the wishes of his sons. No legal maxim is intended to be connoted by it. Of course, the Hindu commentaries hold in some instances that a particular prohibition is directory only and appeals only to the moral conscience of a person. When a text is directory can only be decided from the context and from the nature of the prohibition. This will be clear on a perusal of Ss. 28, 29 and 30 of Colebrooke's Dayabhaga, Ch. II. There in discussing the question whether the father of an undivided family under the Dayabhaga has got the power to make a sale, gift or other transfer of immovable property without the consent of his sons, Jimutavahana considers the effect of a text of Vyasa prohibiting the alienation by a coparcener without the consent of the other coparceners. He says that by the text a moral offence only is intended. Then he proceeds to consider the effect of another text prohibiting the gift or sale of immovable property acquired by a man himself without convening all the sons, and says that though the sale or gift may infringe this precept, it is not void. The reason he gives is the sentence referred to above, *viz.*, a thing or the nature of a thing, cannot be altered by a hundred texts. Raghunandana, commenting on this sentence, refers to the illustration of the precept 'slay

not a Brahmin' and says 'if a Brahmin be slain' the precept, 'slay not a Brahmin' does not annul the murder nor does it render the killing of a Brahmin impossible. What then? It declares the sin. This illustration given by Raghunandana will show how far removed is this phrase from the doctrine of *factum valet.* What Jimutavahana really means is that as the absolute power of the father over the self-acquired property or the ancestral property is established in law, the texts prohibiting alienations by him without the consent of his sons or other coparceners have no legal force and cannot affect the power. As a corollary, instead of saying that the texts prohibiting alienations are absolutely unmeaning, it may be said that they impart a moral offence or sin. But the doctrine of *factum valet* which literally means 'a thing which is not valid, if done, becomes valid' connotes that even though an act or transaction may violate rules or formalities established by law which do not go to the root of the matter, or render the transaction absolutely null, when completed is valid in law and must be recognised by courts. It does not mean that a thing which is not legally valid, if done becomes legally valid. As the Privy Council observed in *Gurulingaswami* v. *Ramalakshmamma*[1]:

" That unhappily expressed maxim causes trouble in Indian Courts. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in law stands good in law,"

That is why in *Budansa Rowther* v. *Fatma Bi*[2] the Madras High Court held that the doctrine of *factum valet* cannot apply to the adoption of an orphan which is invalid under the Hindu law. But in *Venkatacharyulu* v. *Rangacharyulu*[3] where a girl was given in marriage by her mother without the consent of the father the doctrine of *factum valet* applied, as the giving by the mother without the consent of the father does not get to the root of the transaction and marriage once performed according to religious ceremonies should not be set aside except on clear proof of fraud.

Lastly, the principle that a decision if accepted for a long number of years by the public as the basis of their transaction

1. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113 at 144: I.L.R. 22 M. 398 (P.C.).
2. (1913) 26 M.L.J. 260.
3. (1890) 1 M.L.J. 85: I.L.R. 14 M. 316.

should not be disturbed even if it is an error according to the right interpretation of the texts has sometimes been followed by the Judicial Committee (vide *Bhagwan Singh* v. *Bhagwan Singh*[1] and *Jagdish Bahadur* v. *Sheo Partab Singh*[2]). In the first case it was pointed out that, according to the texts, the adoption of the mother's sister's son can be argued to be valid. But the Judicial Committee said that as it had been held for the last 80 or 90 years to be invalid, it will not disturb the original construction. In *Jagdish Bahadur* v. *Sheo Partab Singh*[2] it was pointed out that certain words were added not by the commentator Kullukabhatta but by another inferior commentator, Prakash and Sir William Jones was wrong in thinking it was by Kulluka. But their Lordships said:

> "Sir William Jones' version was probably founded on the tradition of the time at which he wrote, and has been accepted in the Indian Courts without question. *Communis error facit jus* is a sound maxim."

This has been criticised by Sircar Sastri in his Hindu law as inapplicable to India where the highest court is not sufficiently acquainted with the language of the texts and the usages of the people.

SUMMARY OF ENGLISH CASES.

NEWCASTLE-UPON-TYNE CORPORATION AND GATESHEAD CORPORATION *v.* RAILWAY ASSESSMENT AUTHORITY AND L. & N. E. RY. CO., (1937) A. C. 275.

Rating—Railway—Bridge for railway and road for passengers—Upper deck for railway—Lower deck for passengers, vehicles, etc.—Tolls treated as general revenue of the Railway Company—Railways (Valuation for Rating) Act, 1930, S. 1, sub-S. (3)—If lower deck a 'railway hereditament'.

In pursuance of S. 23 of the Newcastle-upon-Tyne and Berwick Railway Act, 1845, which required the company "to construct and maintain a bridge across the river Tyne" and so to construct the said bridge as to make it "available not only for the purpose of carrying the said railway across the river but also for providing a roadway for the passage of passengers", etc., across the said bridge, the bridge in question was constructed by the predecessor of the Railway Company. The bridge consisted of an upper deck for the railway and a lower deck carrying a roadway with a toll house at

1. (1898) L.R. 26 I.A. 153: I.L.R. 21 A. 412 (P.C.).
2. (1901) 11 M.L.J. 178: L.R. 28 I.A. 100: I.L.R. 23 A. 369 (P.C.).

each end of the lower deck to enable the Railway Company to collect tolls from passengers using the lower deck. The tolls so taken went to increase the general revenue of the whole undertaking of the Railway Company. The question arose whether the bridge was a 'railway hereditament' within the meaning of S. 1, sub-S. (3) of the Railways (Valuation for Rating) Act, 1930, and as such rateable only by the Railway Assessment Authority and not as a road-bridge by the corporations under the general law. S. 1, sub-S. (3) defines Railway hereditament as "any hereditament occupied for the purposes of the undertaking of a Railway Company" and "undertaking . . . . . includes . . . . . (*b*) any subsidiary or ancillary undertaking carried on by the company, not being a road transport, sea transport, or air transport undertaking".

Held, that the lower deck was part of the principal undertaking of the company and is a hereditament occupied for the purpose of that undertaking. Even otherwise the roadway undertaking is at least an undertaking "subsidiary or ancillary" to the "principal" or railway undertaking of the respondent company. As such it was a "railway hereditament".

RICHARDS *v.* GOSKAR, (1937) A.C. 304.

Workmen's Compensation Act, 1925, Ss. 1, 43, sub-S. (1)—Workmen suffering from miner's nystagmus—Certificate of disablement—Compensation paid—Workmen joining duty again—Not recovered—Unable to continue—Claim for compensation—If a fresh certificate of disablement necessary.

A workman who has been certified as suffering from miner's nystagmus and thereby to have been disabled, and receives compensation for some time but returns to his former work at his former wages although he has not in fact recovered from the disease, and is still found to be suffering from the same disease, and to be disabled by that disease, is not debarred from recovering compensation on foot of the original certificate. Where therefore a miner suffered in 1932 from nystagmus, and being duly certified received compensation for a time, then joined employment again but finding himself after a time unable to continue left it and applied for compensation but without any further valid medical certificate, and it is found that he was not recovered from the disease, he can rely on the original certificate which he has obtained and it is not necessary that he should obtain a second certificate of disablement before he can receive compensation for the second disablement.

ALDERMAN *v.* GREAT WESTERN RAILWAY COMPANY, (1937) A.C. 454.

Workmen's Compensation Act, 1925, S. 1—Travelling ticket collector—Headquarters at O—Duty to travel from O to S—Stay

overnights at S—Lodgings at S at the workmen's choice—Duty to notify address to employers and to be ready to work if called on for emergencies—Ticket collector leaving his lodgings in the routine course to resume his employment—Accident on the way—If in the course of the employment.

A travelling ticket collector of the G. W. Ry. Co. was residing at Oxford. His duty required him to travel from Oxford to Swansea, where he had to stay overnight, and next morning to return to Oxford. His obligations under the contract of service required him to leave his address with his employers so that they may know where to find him in case he was required for emergency duty as a guard, for which also he was qualified, and to live in a reasonable proximity to the station. He had an unfettered choice at the end of the day's work as ticket collector to spend the night as he pleased and to return to duty the next morning, subject only to this obligation to attend duty if called on for any emergency and he was at liberty to choose what route he pleased to come to the station. One morning he started from his lodgings to go to the Swansea station to take up his duties but slipped and fell in the highway and sustained the injuries in respect of which he claimed compensation.

Held, that the accident did not arise in the course of the employment. The words in the course of the employment do not mean during the currency of the time of the engagement, but in the course of the work which a man is employed to do and what is incident to it. 'In the course of employment' connotes the idea that the workman is doing something which is part of his service to his employer or master. There is no contractual limitation at all of the man's choice of abode either at Swansea or at Oxford. When the workman set out from the house in which he had chosen to lodge in Swansea to go to sign on at the station he was subject to no control and he was for all purposes in the same position as an ordinary member of the public, using the streets in transit to his employer's premises.

London and North-Eastern Ry. Co. v. *Brentnall,* (1933) A.C. 489, distinguished.

KNOWLES *v.* SOUTHERN RAILWAY COMPANY, (1937) A.C. 463.

Workmen's Compensation Act, 1925, S. 1—Accident to workman—Rule prohibiting employees from drinking intoxicating liquor while on duty—Employee driving a van—Employee leaving the van and going to drink—Van tied—Returning after drink and getting into the van—Slipping while attempting to mount on the box seat —Death caused thereby—If accident occurred in the course of employment.

It was a rule of the Southern Railway Company (England) that "employees must not consume intoxicating liquor while on

duty" and it was known to all the employees. A workman *K* was employed as a van driver by the said Southern Railway Company. He was sent on duty from the Railway Company's Tooley Street depot to take a load to their depot at Nine Elms. While on his way from Tooley Street to Nine Elms, *K* stopped his van outside a public house, descended from the box seat having first drawn into the near side kerb, put a chain on the near side hind wheel, removed the near side trace, threw it over the back of the near side house, and put the reins through a brass ring on the harness. Then leaving the van in charge of the boy, he went some distance up a side street to a public house to get a glass of beer and also to use the lavatory. It was found that the dominant purpose was to drink beer. He took beer and went back straight to the van to resume his duty. He removed the chain from the wheel, replaced the trace, took the reins in his hands and was in the act of mounting to the box seat, when, by the horses suddenly moving, he slipped and fell under the wheel and sustained injuries and died. His widow claimed compensation.

Held, that the accident did not arise in the course of the deceased's employment. From the moment that the workman left the driver's seat as the first step towards the public house, he broke off his employment; and none of the acts which he did, such as chaining up the near hind wheel, or unfastening the near trace or putting the reins through the harness ring, were acts done in the course of his employment. Where a man leaves his work in order to break a rule; he necessarily takes himself out of the scope or sphere of his employment, and remains outside its limits until the time he resumes his employment. When he returned to the van he had perforce to do several things before he could resume the work which he was employed to do. He had to unchain a wheel, refasten a trace, take possession of the reins, and regain effective control of his horses in order to start them again on their interrupted journey. The accident happened before the workman had completed the series of acts which, owing to his breach of duty, had to be performed before he could begin to regain effective control of his horses for the purpose of re-starting them on the interrupted journey and therefore the accident did not happen in the course of employment.

EVANS *v.* BARTLAM, (1937) A.C. 473.

Practice and procedure—Decree ex parte*—Application for stay of execution—Stay granted—Later application to set aside the* ex parte *decree—If maintainable—Powers of appellate Court.*

The plaintiff obtained an *ex parte* decree for payment of money against the defendant. The plaintiff's solicitor applied for execution when the defendant appeared and prayed for time to raise the money. Time was granted. Later on, he applied to have the decree

set aside and for leave to defend. The Master refused the application but on appeal the Judge set aside the judgment on terms as to costs. On appeal therefrom, the Court of Appeal reversed the judgment holding that the Judge was precluded from exercising his discretion to set aside the judgment by the fact that with knowledge of the judgment the defendant had applied for the matter to stand over for him to see if he could arrange to pay, thereby electing to abide by the judgment and by the plaintiff having consented to the time being granted, the plaintiff gained a benefit, namely, time, which he cannot reprobate.

Held (reversing the Court of Appeal), that where a judgment-debtor asks for and obtains stay of execution, he does not approbate the judgment so as to preclude him thereafter from seeking to set it aside whether by appeal or otherwise.

While the appellate Court will not normally interfere with the exercise of the Judge's discretion on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done, it has both the power and the duty to remedy it. Appellate jurisdiction is always statutory and there is in the statute (Rules of Supreme Court) no restriction upon the jurisdiction of the Court of Appeal.

KIRK *v.* EUSTACE, (1937) A.C. 491.

Husband and wife—Deed of separation—Covenant to pay a weekly sum to wife during her life—Death of husband—If estate liable to pay—Absence of provision binding the estate—Law of Property Act, 1925, S. 80.

By a deed dated 23rd September, 1922, made between the husband T.L.K. and his wife A.M.K., they had mutually agreed to live apart and the husband had agreed to pay his wife "a clear weekly sum of two pounds during her life for the maintenance and support of herself" so long as she "shall continue to lead a chaste life". There was a further provision that in case they "shall at any time hereafter cohabit as man and wife then and in such case the said weekly sum of two pounds shall no longer be payable and all the covenants hereinbefore contained shall become void". In 1936 the husband died and the executors refused to pay the sum contending that the deed was effective only during his lifetime.

Held, that on the plain construction of the agreement, the husband's estate remained liable to pay this sum which he had covenanted to pay to the wife during her life. Though the covenant is not expressly made by the covenantor for his executors and administrators, the deed must be read as so made, by virtue of S. 80 of the Law of Property Act, 1925, which has only reproduced the old law contained in the Conveyancing Act, 1881.

ANDREWS *v.* DIRECTOR OF PUBLIC PROSECUTIONS, (1937) A.C. 576.

Criminal law—Manslaughter—Reckless driving of motor car —Elements to be considered—Road Traffic Act, 1930, S. 11 and Road Traffic Act, 1934, S. 34.

The accused was employed by L. Corporation Transport Department. On the day of the accident he was directed to take a van to assist a corporation omnibus which had broken down about four miles away. One *B was* driving a saloon car down the road at about 10 miles an hour and he noticed about 30 yards ahead, the deceased *C* crossing the road from *B's* nearside. The road was 29 feet wide. The accused driving fast over 30 miles an hour and driving well over on the offside of the road ran into *C* who was then within 3 or 4 paces of the kerb. He was carried on the bonnet for a short period, thrown forward and run over by the van. On a charge of manslaughter the Judge summed up as follows:—"If a man is doing an unlawful act—if he is doing something which the law says that he must not do, and because he is doing it, he kills somebody, then he is guilty not only of that unlawful act, but of manslaughter. He has killed somebody in the course of doing and because he was doing, an unawful thing. If he is driving (a motor car) recklessly he commits an offence whether he kills anybody or whether he does not, but if because he is driving recklessly somebody is killed, then he is guilty of the offence of manslaughter. I think I ought to tell you this, that if you thought that although he drove recklessly and although he drove at a speed or in a manner dangerous to the public within the words of (S. 11 of the Road Traffic Act, 1930) but that it was not because of that that this man was killed, the law would entitle you to convict him not of manslaughter but of dangerous driving. But in this case I am bound to tell you that if you think that he was driving recklessly and in a dangerous manner within the meaning of these words, and it was because of that Mr. C. was killed, then it is your bounden duty to convict him of manslaughter."

Held, that though there may be something open to criticism in the earlier portion of the charge, on a consideration of the summing up as a whole, the true question was ultimately put to the jury and on the evidence the verdict of guilty was inevitable. In directing the jury in a case of manslaughter by rash driving, the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in Bateman's case, namely, that the facts must be such "that in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. Then

the judge should explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death was caused by dangerous driving within S. 11 of the Road Traffic Act, 1930, and no more would be a misdirection.

N.B.—Ss. 11 and 21 of the Road Traffic Act, 1930, are as follows:—

Road Traffic Act, S. 11, sub-S. (1): "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable (to fine or imprisonment)."

"Section 21 makes provision for the giving of notice to persons whom it is intended to prosecute under (*inter alia*) S. 11."

Section 34 of the Road Traffic Act, 1934, is as follows:—

"Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 11 of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence."

In re A DEBTOR, (1937) 1 Ch. 181.

Insolvency—Moneylenders Act, 1927, S. 9, sub-S. (1)—Petition by moneylender to adjudicate debtor—Claim for principal and 5 per cent. interest—Balance interest reserved as claimable under S. 9, sub-S. (1)—Tender by debtor of principal and 5 per cent. interest alone—If creditor bound to accept—Jurisdiction to make receiving order.

At the time of the bankruptcy petition, there was due by the debtor certain sums at more than 5 per cent. interest. The moneylender filed a petition to adjudicate the debtor an insolvent setting out the amounts due under certain promissory notes with 5 per cent. interest and then it (petition) added "and we have also a claim for interest on the said two promissory notes which is postponed interest under S. 9, sub-S. (1) of the Moneylenders Act, 1927," for a certain sum. At the hearing, the debtor tendered all the moneys due with 5 per cent. interest only but the moneylenders refused to accept it. The debtor contended that he had tendered what was due and as that was not accepted the petition must be dismissed. S. 9, sub-S. (1) of the Moneylenders Act, 1927, provides that "where a debt due to a moneylender in respect of a loan made by him shall, for the purposes of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition . . . . be calculated at a rate not exceeding 5 per cent. per annum, but nothing in the

foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled".

Held, that in computing the fifty pounds required for presentation of a bankruptcy petition by S. 4 of the Bankruptcy Act, 1914, S. 9, sub-S. (1) would have the effect that the figure should be arrived at only by utilising by way of interest not more than 5 per cent., but that does not make the debt any the less a debt due. The sum of interest beyond the 5 per cent. was in law owing by the debtor to the moneylenders and in the event of debts proved in the estate being paid in full the moneylender would be entitled in the bankruptcy proceedings to that sum. The mere fact that they could not include it in the quantum which would enable them to bring in a petition does not prevent it being said that it was part of the debt owing to them recoverable in bankruptcy proceedings. The petition cannot therefore be dismissed.

In re: KEEN. EVERSHED *v.* GRIFFITHS, (1937) 1 Ch. 236.

Will—Secret trust—Clause to pay such person 'as may be notified by me' to the executors or either of them—Notification to one trustee prior to will—If evidence of such trusts admissible—If such a notification valid—Wills Act, 1837.

A testator by his will, dated 11th August, 1932, appointed *K, H,* and *E* to be executors and trustees of the will and by cl. (5) stated "I give to the said *H* and *E* the sum of 10,000*l.* free of duty to be held upon trust and disposed of by them among such person or persons . . . . . as may be notified by me to them or either of them during my lifetime and in default of such notification and so far as such notification shall not extend I declare that the sum of 10,000*l.* or such part thereof as shall not be disposed of in manner aforesaid shall fall into and form part of my residuary estate". It was in evidence that he had told Mr. *E* in 1928 when he wrote a will containing an identical clause that he (testator) wished to give a legacy to a person whose name he wished to keep secret and in March, 1932, when a new will was written he brought a sealed envelope addressed to *H* and *E* and handed it over to Mr. *E* with instructions to keep it with his will and open it after his death. The envelope contained a memorandum signed by the testator, containing the beneficiary's name with the words "in accordance with the directions in my will". In August, when the last will in question was executed, cl. (5) was left intact and this cover remained with Mr. *E.* Mr. *H* was not notified of this will after the testator's death.

Farwell, J., held that the clause required the name and identity of the beneficiary to be expressly disclosed to the trustees dur-

ing the testator's lifetime and as that was not done it was not enough.

Held, by the Court of Appeal (affirming Farwell, J., on other grounds) that giving of the envelope would be sufficient notification. But cl. (5) should be considered as contemplating future dispositions and as reserving to the testator the power of making such dispositions without a duly attested codicil, simply by notifying them during his lifetime but that is invalid as contrary to Wills Act, 1837, as pointed out by Lord Sumner in (1929) A. C. 339. Further the trusts which it is sought to establish by parol evidence would be inconsistent with the express terms of the will. If cl. (5) had been worded as applying to trusts previously indicated by the testator, the sealed letter would have been admissible, subject to proof of communication and acceptance of the trust.

Blackwell v. *Blackwell,* (1929) A. C. 318, distinguished.

CAHILL *v.* LONDON CO-OPERATIVE SOCIETY, LIMITED, (1937) 1 Ch. 265.

Industrial and Provident Societies Act, 1893, S. 10, sub-S. (6)—Industrial and Prudential Society—Co-operative Society registered under the Act—Rule allowing allocation of a percentage of net profits for political activities.

A society was registered in 1920 under the Industrial and Prudential Societies Act, 1893, with a membership of 530,610 persons and a share capital of 6,790,509*l.* odd. One of the rules provided that "5 per cent. of the net profits shall be allocated to an education and a Political Fund". The society since its registration allocated out of the net profits earned to an education and a political fund of the society and had applied half of that to political activities. The question was if such application was proper and *intra vires.*

Held, that sub-S. (6) of S. 10 of the Industrial and Provident Act, 1893, provides that "the rules of every society registered under this Act shall provide for the profits being appropriated to any purposes stated therein or determined in such manner as the rules direct". The words "any purpose" are very wide and therefore it cannot be limited as to any purposes connected with the society's objects. The allocation was therefore *intra vires.*

Decision of Lord Ormidale in *Lafferty* v. *Barrhead Co-operative Society, Ltd.,* (1919) 1 Sc. L. T. 257, applied.

ADAMSON *v.* BIRKENHEAD CORPORATION, (1937) 1 Ch. 279.

Costs—Practice—'Defendants to have the costs except costs attributable to an issue'—Effect of—If plaintiff entitled to appor-

tionment—Repeal of R. 5 of O. 65 of Rules of Supreme Court—Effect of.

In dismissing an action, the Judge directed the defendants to have the costs of the action (to be taxed as between solicitor and client) except the costs attributable to a particular issue, the costs on that issue to be the plaintiff's and to be taxed as between party and party.

Held, that the repeal of R. 2 of O. 65 of the Rules of Supreme Court has made no difference in this respect and an order of this kind is to be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, and the plaintiff cannot claim to have the general costs of the action apportioned, as was the case before 1902.

In re: MORTIMERS (LONDON), LIMITED, (1937) 1 Ch. 289.

Company—Voluntary liquidation by members—Appointment of liquidator and fixing of remuneration—Later compulsory order to wind up by Court—If voluntary liquidator's remuneration can be reviewed by Court—Companies Act, 1925, S. 175 and Companies Act (Winding-up) Rules 1929, r. 192—Effect of.

At an extraordinary general meeting it was resolved that the company should be wound up voluntarily and at a later meeting pursuant to S. 232 of the Companies Act, 1929, the remuneration of the voluntary liquidator was fixed by the members at 550*l.* About a month after, the company was ordered to be compulsorily wound up on a petition of a creditor. The voluntary liquidator claimed that his remuneration must be deemed to have been validly fixed under the provisions of S. 175 and that he was entitled to the whole of it.

Held, that on compulsory liquidation, the distribution of assets on such a winding up is fixed by r. 192 of the Companies (Winding-up) Rules of 1929 and under it the Court, in any case where a voluntary liquidation has been superseded by a compulsory order, has power to review any remuneration that has been fixed to the liquidator either by the members or by the creditors.

LEWIS *v.* PLUNKET, (1937) 1 Ch. 306.

Mortgage—Title deeds of property in possession of mortgagee—Mortgage barred—Mortgagor in possession of the properties—Mortgagor if can claim possession of title deeds.

By a mortgage dated 18—3—1921 the plaintiff mortgaged to the defendants certain hereditaments for securing a loan of 1,600*l.* with interest at 6 per cent. per annum. The mortgage deed and other title deeds were handed over to the defendant. In

November, 1921, the plaintiff duly paid to the defendant interest due under the mortgage. That was the only payment of interest and no further payments were made and no acknowledgment of the debt. In 1936 the mortgagor filed the suit for delivery to her of the mortgage deed and all other title deeds in the possession or control of the defendant.

Held, that the plaintiff was entitled to succeed. *Prima facie* the legal estate is in the person who is in possession of the property, that is, the plaintiff. The effect of the Statutes of Limitations is not to convey any estate or interest from the person in whom it was originally to the trespasser or other person who acquires a title by virtue of the Acts, but on the other hand the estate, whether it be legal or equitable or both, of the original mortgagee or the original owner, is put an end to once and for all by these statutes. That person no longer has any title in law or in equity, his rights having ceased. The plaintiff having an indefeasible title is entitled to get back the title deeds to which she is entitled.

IRON TRADES EMPLOYERS INSURANCE ASSOCIATION, LTD. *v.* UNION LAND AND HOUSE INVESTORS, LTD., (1936) 1 Ch. 313.

Mortgage—Mortgage-deed—Mortgagor covenanting not to exercise his power of leasing given by the Law of Property Act, 1925, without mortgagee's consent—Lease granted without such consent—If amounts to a breach of the covenant not to lease.

By a legal charge, dated 1st October, 1935, the defendants (borrowers) charged the lands comprised in the charge and certain other freehold premises to the plaintiffs (mortgagees) and under it the defendants agreed not to exercise the power of leasing conferred on them as mortgagors in possession under the Law of Property Act, 1925, without the previous written consent of the plaintiffs. But shortly afterwards the defendants demised a part of the premises on a yearly tenancy without the consent of the mortgagees. When the mortgagees came to know of it, they brought an action for a declaration that such a lease constituted a breach of the agreement.

Held, that the Act did not take away the power of a mortgagor in possession to lease as it stood before the Act. Before the Property Act of 1925 and the Conveyancing Act, 1881, the position was that in the case of a legal mortgage, the mortgagor although in possession, had no power at all to grant a lease which was binding on the mortgagees. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest against the mortgagee except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession. As between the mortgagor and the lessee it was a good lease. The Con-

veyancing Act, 1881, gave some power to the mortgagor to grant a binding lease under certain circumstances. The mortgage deed only dealt with this right and it is this right that the mortgagor agreed not to exercise without mortgagee's consent. There has been therefore no breach of the contract, as the mortgagors were not exercising their statutory power.

In re: T. N. FARRER, LIMITED, (1937) 1 Ch. 352.

Company—Governing Director—Appointment for life or voluntary retirement at a salary—Voluntary winding-up—If Director entitled to damages for loss of office.

A company was incorporated as a private company for the purpose of carrying on shoe trade. One *J* held 2,100 shares out of 2,102 issued. By Article 12 it was provided that *J* should be the governing director of the company for life or until he should resign or be removed by special resolution. His remuneration was fixed at £300 a year. From 1927 to 1933 *J* was the sole director of the company. In 1934 an extraordinary resolution was passed for voluntary winding up of the company and the company was accordingly wound up. Mr. *P* and Mr. *B* were appointed liquidators. *J* assigned all his assets to his creditors and the assignees claimed from the liquidators, along with the moneys advanced by *J* to the company, compensation for loss of office as managing director.

Held, that *J* held office on the terms of the articles. It is from them alone that the terms of his contract can be ascertained. The result of the resolution to wind up in the circumstances was to put an end to the contract. But as the terms of the contract is to be found only in the articles, it is a condition of the continued employment of the director that the company must continue to exist. The employment of the governing director was, therefore, as a matter of contract, limited to the active life of the company. Therefore there has been no breach of the contract and as such no compensation can be claimed as for breach.

The question whether where apart altogether from the articles, the company and the director have entered into an independent agreement, and the period of service is for a fixed term or for the life of the director, and the company goes into liquidation, the company can claim compensation for loss of service left open.

JOTTINGS AND CUTTINGS.

Life Peerages.—There has been an interesting correspondence in the *Times* on Life Peerages, and there was a debate on the subject in the House of Lords on March 24, on a motion by Lord Strickland. The debate, in which fortunately the Lord Chancellor was able to take part, led nowhere, though Life Peerages and a

restriction of the hereditary element offer the simplest way of reforming the constitution of the House, which, though long delayed, is, it is safe to say, bound to come. It seems axiomatic that it had better come on the initiative of the House of Lords itself than be forced on it from without. The correspondence began in the *Times* of March 12 with a letter from Sir John Marriott questioning the finality of the decision of the Committee of Privileges in 1856 in the *Wensleydale* case, when it was proposed to confer a life peerage on Baron Parke. It included a letter (March 15) from Mr. Edward F. Iwi, pointing out that, on the authorities, a resolution of the Committee is not a final judgment, and referring to the *Rhondda case,* (1922) 2 A.C. 376, in which Lord Birkenhead induced the Committee to reverse its previous decision that a peeress in her own right could, since the Sex (Disqualification Removal) Act, 1919, receive a summons to Parliament. This left the sufficiently absurd result that a peeress cannot sit in the House of Lords, but the wife of a peer can sit in the House of Commons. That, of course, does not touch life peerages, but it shows that a decision of the Committee of Privileges is not final. In a letter (*Times,* March 30) summing up the correspondence, Sir John Marriott suggests that the Crown (of course, on advice) should to-day ignore the Wensleydale decision. The appointment of life peers, if made, would no doubt produce an interesting situation. Very possibly it would be generally acquiesced in as an excellent innovation. Then would arise the question of restricting the hereditary element.—*L.J., 1937, p. 227.*

The Speed Limit: *A Novel Point.*—Section 3 of the Road Traffic Act, 1934, exempts a motor-vehicle from the speed limit when used for "fire-brigade, ambulance or police purposes" if observance of the limit "would be likely to hinder the user of the vehicle for the purpose for which it is being used on that occasion". Can a private person, seeing a motor-vehicle which he believes to be exceeding the speed limit, pursue it with a view to obtaining by his own speedometer evidence of an offence, and then justify his own excessive speed on the ground that he was acting for "police purposes"? This pertinent question does not appear to have been the subject of judicial determination in England, but the High Court of Justiciary of Scotland recently answered the question in the negative in *Strathern* v. *Gladstone,* (1937) Sc.L.T. 62. This was a case stated by the Sheriff Substitute of Lanarkshire, who found as fact that the defendant had seen a police car which he believed was being driven at an excessive speed. The defendant accordingly pursued it in order to obtain evidence of a breach of the law, but was himself stopped and charged with exceeding the speed limit. The Sheriff Substitute further found that the police car was exceeding the speed limit without justification, but that

the defendant was justified if in the opinion of the High Court he was using his car for "police purposes". The Court held that he could not crave in aid this statutory exemption, in that the general public duty of preventing breaches of the law did not justify in the case of so trivial an offence the offender himself breaking the law; and that the words "police purposes" was not an apt expression to describe this general public duty. Whilst not of binding authority, we imagine that this decision is one whose reasoning would commend itself to the Courts of this country if and when they are called upon to determine this question.—*L.J., 1937, p. 228.*

Libel or No Libel.—The Court of Appeal again could not agree recently as to an interesting libel action which came up from Assizes (*Byrne.* v. *Dean,* 1936, 3 All. E. R. 204). The Judge on Circuit thought that a few lines of doggerel verse put up on a club notice-board were capable of bearing a defamatory meaning, and awarded a small sum in damages. The innuendo alleged was that those who read the doggerel would think badly of the plaintiff, because they would infer that he had told the police that some sort of unlawful gaming was going on in the club. Most of our readers will agree with the learned Judge below, and with the dissenting Lord Justice of Appeal (Greer, L.J.), that it is socially defamatory to say of a member of a club anything which implies that he is disloyal to his fellow clubmen. The two other Lords Justices, however, took the stricter view—that it cannot be defamatory to say of a person that he has assisted the police or other lawful authority to carry out the law or detect cases of infringement. There is, of course, a host of authority to say that the Judge alone must decide whether or not words are capable of bearing a defamatory meaning. But even after the most industrious perusal of *Capital and Counties Bank* v. *Henty* (7 A.C. 741), we have to reconcile ourselves to the truth that the vital question is one of opinion, not of law. Opinions, even of the best Judges, may differ. They have now done so.—*L.J., 1937, p. 229.*

Judicial Notice of Scott's Novels.—Readers of the Antiquary may remember that Monkbarns explains to his nephew that in Scotland no man can be legally imprisoned for debt. "You suppose," he said, "that a man's committed to prison because he cannot pay his debts. Quite otherwise; the truth is, the King is so good as to interfere at the request of the creditor and to send the debtor his royal command to do him justice within a certain time —fifteen days or six, as the case may be. Well, the man resists and disobeys; what follows; Why, that he be lawfully and rightfully declared a rebel to our gracious sovereign, whose command he has disobeyed, and that by three blasts of a horn at the market place of Edinburgh, the metropolis of Scotland. And he is then lawfully imprisoned, not on account of any civil debt, but because

of his ungrateful contempt of the royal mandate". In the case of *Thom* v. *Black* (7 Shaw 158), which came before the Court of Session when Scott was acting as Clerk, Lord Gillies enlarged on the different modes of securing or attaching property such as arrestment, inhibition, poinding, and adjudication; "but, in regard to the person," he went on to say, "the principle is that it cannot be laid hold of for debt. Before this can be done the debtor must be declared a rebel, and it is only as a rebel that he can be imprisoned. The law of the subject cannot be better expressed than it is by Monkbarns in a work of fiction with which we are all well acquainted". On can imagine Scott's embarrassment as well as enjoyment on hearing this judicial approval of the law which he had laid down. This, by the way, was not the only occasion when Scott's work received judicial notice. Lord Hermand is said to have been so carried away by enthusiasm for Guy Mannering that his brother Judges failed to restrain him from plucking the book from his pocket and reading a passage in illustration of his Judgment.—*L.T., 1937, p. 264.*

School Attendance.—An interesting case on school attendance came before a Bench in Wales this week. A number of parents were summoned by the Glamorganshire Education Committee for failing to send their children to school. Their defence was that the children could not get from their homes to the school without taking one or other of two dangerous ways. The magistrates, after a view, upheld the defence. The Education Act of 1921 allows cestain defences to proceedings of this kind which the magistrates are bound to accept. One is, of course, sickness; another, that there is no public elementary school within such distance as the by-laws may prescribe, but this may never exceed three miles; another, that the child is being efficiently taught elsewhere. As to this last the Court has some discretion. The decision of the Divisional Court in *London County Council* v. *Maher* (93 J.P. 178) shows, however, that these statutory defences are not the only pleas which are open to parents who are summoned in this way. Some other excuse may be put forward, and it then becomes a matter for the Justices to determine in their discretion whether it is reasonable. Most people will agree that young children should never be asked to put themselves in peril when going to school; and it is satisfactory that the law enables the magistrates to say so.—*L.J., 1937, p. 246.*

Pitt Taylor.—Mr. Mathew's narrative of the extinction of the Palace Court includes the interesting additional fact that Pitt Taylor, the author of the standard work on Evidence, devilled the brief for the counsel instructed on behalf of Higgins, and, according to the latter, made so poor a fight that the defence was hopeless. Whatever may have been the ineffectiveness of the fight put

up, it appears to have been due to a badly drawn brief, with many of the material facts omitted. Infuriated in his turn by the aspersion upon his alleged failure to do justice to the cause of the client for whom he appeared, Pitt Taylor also wrote a long letter to *The Times,* but couched as it was, according to Mr. Mathew, in such indignant and vituperative terms, the authorities of Printing House-square published only an expurgated version of the missive. Pitt Taylor was not the man to take things lying down, and he certainly showed cause against the contention of Higgins that he had been badly let down.—*L.T., 1937, p. 283.*

Pitt Taylor's Law of Evidence.—Now, the fair fame of John Pitt Taylor rests not upon his connection professionally with the famous cause in the Palace Court which contributed to its extinction, but to the fact that to him we owe the first work—not, of course, in point of time, but of importance and value—exhaustive and well written, on the Law of Evidence, but, as someone has said, a reputation as a legal writer can hardly be established even when executed so admirably as was that of Pitt Taylor's. Even his connection with the Pitt family, whence he got his second name, did not, in the opinion of the editors of the Dictionary of National Biography, entitle him to a place in its pages. It would appear that he was early attracted to the subject of evidence, for in 1842 he reviewed the third edition of Starkie's book on the subject in which he started off with the cheerful dictum that "of the first three editions of a law treatise the third is usually the worst," and he then subjected the work under review to a severe cross-examination, and, finding it wanting in many respects, did not hesitate to say so in very plain terms. Remembering this when he came to produce his own elaborate work, he sought, and successfully sought, to make even the third edition better than its predecessors. Unlike many writers of legal treatises, he did not disdain to enliven the text with some apposite quotation from lighter literature; thus he set out the classic passage from Pickwick, where Sam Weller is solemnly informed by Mr. Justice Stareleigh that "you must not tell us what the soldier or any other man said; it's not evidence"; and not only did Pitt Taylor do this, he actually included in the Table of Cases prefixed to the volume the entry, *"Bardell* v. *Pickwick,"* which a later editor excised as being apparently too frivolous. In the fifth edition it is interesting to recall that the future Lord Justice Romer—the father of the present Lord Justice—lent assistance in the preparation of the index, and, as he did when performing a similar task for one of the editions of Smith's Leading Cases, he enriched it with not a few humorous entries which rejoiced the hearts of those who love their more solid professional literature to be lit up now and again by a little humour.—*L.T., 1937, p. 283.*

Controversy with Chief Justice Cockburn.—Pitt Taylor was ever ready for a fray, whether it was to defend himself against the charge of ineffective devilling in the Palace Court, or in maintaining his opinion on a question of the law of evidence, which he had made his own territory. In the eighth edition of his work he made a brief reference to *Reg.* v. *Bedingfield,* (14 Cox. C. C. 341) which gave rise to a pamphlet warfare between him and Chief Justice Cockburn on the propriety of the latter's ruling in the case just mentioned. By this time Pitt Taylor was on the county Court bench, and he was solemnly admonished by the Chief Justice that it was contrary to judicial etiquette to enter into a newspaper controversy. To this Pitt Taylor rejoined that though he held a judicial office, "albeit I am the least of the judges, and am not worthy to be called a judge," the Chief had shown how little the reprimand was merited by sending his letter to *The Times.* Cockburn further exposed himself to a caustic answer to some sneering references to Taylor's work on Evidence. This was an unlucky shot, for as it happened Cockburn, many years previously, in acknowledging a presentation copy of the work, wrote a most eulogistic letter to Pitt Taylor, concluding with the words: "I sincerely congratulate you on having associated your name with a work which will be read and admired while English law remains". Pitt Taylor could not refrain from reproducing this morsel in his pamphlet, and probably Cockburn regretted his sneer or the reference to the great repository of evidential law.—*L.T., 1937, p. 284.*

The New Deals in the West.—The two great divisions of North America, the United States and the Dominion of Canada, form an interesting study in the effect of written constitutions. Each has its "New Deal," which may be defined as an attempt to correct on a vast scale the unfortunate effects of unregulated trade and industry, and each has suffered from the grip of a written Constitution as interpreted by a Court of Law. In the United States it is the Supreme Court. For Canada it is the Judicial Committee of the Privy Council. Between these two tribunals there is the distinction that the Supreme Court, like the House of Lords, allows separate judgments and therefore dissent is possible; though we believe it is the practice for only two judgments to be delivered, one representing the view of the majority, and the other that of the minority. With the nine members a majority of five to four appears not to be uncommon. So a change of view of a single Justice may reverse the Court's mode of interpretation of the Constitution.—*L.J., 1937, p. 261.*

The Supreme Court's Change of View.—This appears to have happened in the series of five decisions of the Supreme Court last Monday, when a majority of five to four established the validity of the Wagner Labour Relations Act, which gives to workmen the

right of collective bargaining. It is natural for people who do not know the judicial mind to trace what looks like a change of attitude to President Roosevelt's scheme for reforming the Court by appointing younger men as additional Justices. But no doubt the change though *post hoc* is not *propter hoc.* And Chief Justice Hughes, who delivered one of last Monday's majority judgments—incidentally he described the right of workers to organise and to bargain collectively as a "fundamental right"—has protested in a letter presented to the Senate Judiciary Committee who are considering the President's scheme, that the result of it would be to impair the efficiency of the Court. It is interesting to note that, in a decision given on March 29, the Court by its customary majority of five to four upheld the right of a State—the State being Washington—to establish a minimum wage for women. This reversed the previous decision given as regards other States, including New York, that such a law was invalid. Thus the Supreme Court in recognising that its own previous decision may have been wrong differs from the House of Lords, which declines to admit error. And yet some decisions of the House of Lords have been found to be by no means beyond criticism.—*L.J., 1937, p. 261.*

Peaceful Blockade.—The blockade of Bilbao may well go down to history as the most warlike of peaceful blockades. As blockade proper it is not admitted; real blockade is only legitimate as an act of war and cannot be created except by recognised belligerents. Nor is this situation affected by any non-intervention treaty, which relative to the fighters is only the municipal law of other nations, and only relevant as a limited recognition by those nations of a principle of contraband. So far as Great Britain is concerned, peaceful blockade is not operative against neutrals, nor has been since Great Britain abandoned its more bloodthirsty practices at the end of the eighteenth century. France, since the blockade of Mexico in the eighteen-fifties, appears to have adopted British practice. But the position has been made almost impossible by the practice of mine-laying. During the War 1914-1918, mine-laying had the effect of translating neutrals into combatants. On the same principle, mine-laying makes a peaceful blockade into a blockade of war. During the last few days, Great Britain has tactfully negotiated the diplomatic dangers of mine-fields, and as yet neither admits nor tests the rights of the mine-layers. But the position is difficult. Either this mine-laying is war by an unrecognised belligerent, or else a new formula must be found. For mines are surely of a nature to be classified with those "realites que les jurisconsultes doivent avoir toujours presentes a l'esprit, s'ils ne veulent point exposer leurs systemes aux perpetuels dementis de l'experience".—*L.J., 1937, p. 261.*

Ex Facto Jus Oritur.—The other point of importance in *Robinson Bros. (Brewers), Ltd.* v. *Houghton and Chester-le-Street, A. C.* is as to the reversal of decisions of long standing. When an erroneous decision has been practically applied for a number of years the Courts may be somewhat averse to altering the law. But the case in question indicates that where a decision is plainly wrong, and practical injustice will arise in the consequences that must flow if the decision is still applied, the duty of the Court is clearly to overrule it. This course was in fact taken here, since the practical injustice that otherwise would have flowed would have been that brewers would be underrated, with the consequence that the burden of rates would be unfairly apportioned among other ratepayers. We may add that the judgments will repay a very careful study and that much useful guidance is to be found therefrom as to the general principles of rating valuation. The Lords Justices all arrived at the same conclusion, though the *ratio decidendi* was different.—*L.J., 1937, p. 263.*

Lawyer and Litterateur.—Among forthcoming publications, one which we are promised almost immediately and which should make a wide appeal, not only to those interested in the world of books, but also to members of the legal profession, is the Autobiography of the late Mr. Augustine Birrell, whose manifold activities—in law, in letters, and in politics—were all lit up by many a wise and witty saying. A bookman, if there ever was one, he possessed the art of making his keen interest in letters generally contagious, and indeed his own admirable style and his comment on life, at once pungent, yet kindly, made him all unwittingly add a new word to the language, namely, "Birrellism," which may be found in the appendix to the latest edition of the Oxford Concise Dictionary. In all his books he never let us forget his legal training and his legal practice; the very titles of several of his volumes —Obiter Dicta, Res Judicatæ, and More Obiter Dicta, all smack of the law, but not only their titles, their contents every now and again bring us many reminders of his liking for apposite technical phrases which come home to lawyers' business and bosoms. Thus, in his essay on Milton in the second series of Obiter Dicta, in dealing with certain portions of Paradise Lost, he says that "for Milton to essay to justify the ways of God to man was well and pious enough, but to represent God himself as doing so by argumentative process was not so well, and was to expose the Almighty to possible rebuff. The King is always present in his own courts, but as judge, not as advocate; hence the royal dignity never suffers. It is narrated of an eminent barrister, who became a most polished judge, Mr. Knight Bruce, that once, when at the very head of his profession he was taken in before a Master in Chancery . . . .

and found himself pitted against a little snip of an attorney's clerk, scarce higher than the table, who, nothing daunted, and by the aid of a bundle of books as big as himself, succeeded in worsting Knight Bruce, whom he persisted in calling over and over again 'my learned friend'. Mr. Bruce treated the imp with that courtesy which is always an opponent's due, but he never went before the Masters again."—*L.T., 1937, p. 300.*

Legal and Literary Allusions.—Disraeli the elder in his Curiosities of Literature has an interesting chapter on Quotation, in which he tells us that the art of quotation requires more delicacy in the practice than those conceive who can see nothing more in a quotation than an extract, and that to make a happy one is not easily done. Of the truth of this we are made familiar by countless examples in the pages of Mr. Birrell's books which come home to the judicious reader who is also a bookish person. Not very many, it may be supposed, nowadays become quite so dithyrambic as did Richardson's contemporaries when we are told that not only in this country was the excitement intense over his Clarissa; it was so also in France, Germany and Holland where Clarissa was gulped down. She even invaded the precincts of the law, for, as Mr. Birell told us, Serjeant Hill, though averse to literature, used to set Clarissa's will before his pupils and bid them determine how many of its uses and trusts could be supported in court. It appeared that in the learned Serjeant's opinion poor Clarissa, in addition to all her other misfortunes, died intestate. Again, in the essay on Dr. Doddridge, the noted Nonconformist and hymn writer, our attention is recalled to the fact that among his ancestors was Sir John Doddridge, a judge of the King's Bench in the Stuart period, regarding whom Fuller said that he was called "the sleeping judge" because he would sit on the bench with his eyes shut, which was only a posture of attention to sequester his thoughts from distracting objects, the better to listen to what was alleged and proved—an explanation as to which the essayist curtly adds that "this judicial habit of 'sequestration' still lingers on the bench, and is sometimes otherwise accounted for". But the old sleeping judge's name reminded the essayist that the authorship of Sheppard's Touchstone of Common Assurances has been attributed to Sir John Doddridge, and mention of this classic prompts the amusing addendum that 'if any of my readers are ever seized with a burning curiosity to discover what is an escrow, I can confidently refer him or her to Sheppard's Touchstone"—a pleasant quip which every lawyer will relish.—*L.T. 1937, p. 300.*

His Advice to Law Students.—At one time, it will be remembered, Mr. Birrell had a fair practice at the Chancery Bar both as a junior and when he became a silk. A very sound lawyer he was,

and knew how cases should be prepared and argued. A good many years ago, he delivered a lecture before the Liverpool Law Society on Legal Education, in which, after urging on his audience the importance of an historic study of the law, he warned them that much of the law to be found in the old reports owed its existence to the very conventional manner in which evidence was then admitted or rejected. "Nowadays," he went on, "judges are perfectly free to get at the real facts of any case that comes before them. When they have got at the facts or, at all events, thought they have got at them, or say they have got at them without thinking so, it is amazing how seldom any law is left. Get at the facts and most cases will decide themselves. It is painful to think how much subtle law has been manufactured upon a purely imaginary state of facts." No better advice could have been given to those beginning the study of the law and its practice.—*L.T., 1937, p. 300.*

Workmen's Compensation Cases.—Several years ago, in the course of some interesting reminiscences, the veteran Lord Dunedin recalled an incident in connection with the passage through the House of Commons of the Bill which eventually became the first Workmen's Compensation Act. As introduced, the Bill contained a clause prohibiting an injured workman, who proposed to claim compensation, from employing a paid lawyer. Lord Dunedin, then Mr. Graham Murray, was in charge of the Bill so far as its application to Scotland was concerned, and, being unsympathetic towards the exclusion of lawyers, he inserted a clause removing the embargo in proceedings north of the Tweed; but the immediate sequel was that—to use his own expression—he "got a wigging from Mr. Joseph Chamberlain for so doing", as, in that stateman's opinion, "there would be but little litigation arising out of the measure". Like many another forecast of what is likely to happen, this, as we all know, was singularly wide of the mark, and is evident in the yearly output of reports of cases involving the consideration of almost every section of the Act—reports whose headnotes fill column after column in the Digest. Only last week the House of Lords was called upon once again to solve the question whether the accidents giving rise to claims for compensation arose out of and in the course of the workmen's employment, and in both appeals this question was answered in the negative. Cases of this kind are largely questions of fact, but they are not, on that account, by any means easy of solution, as we may see by the frequency of divergent views entertained by the various tribunals before which they come—a curious commentary on Mr. Chamberlain's prophecy. —*S.J., 1937, p. 305.*

The Inheritance (Family Provision) Bill in Committee.—The committee stage of the Inheritance (Family Provision) Bill was concluded before a Standing Committee of the House of Commons

last Friday week. A new clause, which was accepted by the committee, provides, in effect, that the court in considering applications shall have regard to a testator's reasons for disinheriting or not making further provision for a spouse or child, and enables the court to accept such evidence of those reasons as it considers sufficient. By the same clause a statutory declaration by the testator of his reasons is to be accepted as *prima facie* evidence of the proof of the matters stated therein, whether of his motives or of the facts that influenced him. Mr. H. Strauss, who moved this amendment, stated that there were reasons which might make it perfectly proper for a testator to exclude a child from his will and instanced the case of a child who might have been provided for more than once, when it might be unjust to other members of the family if further provision were made for that child. Another new clause, also moved by Mr. Strauss will enable the court to vary an order in a downward direction if any new fact is brought to its notice. With regard to the courts before which applications under the new measure should come, it had been suggested that it might be well to exclude such cases from the county court for a limited period, and it may be noted in this connection that the Attorney-General withdrew an amendment which would have removed applications from the county court and undertook to consider the matter before the Report stage.—*S.J., 1937, p. 305.*

Ministerial Salaries.—The Ministers of the Crown Bill was read a second time in the House of Commons on Monday, an amendment to the effect that the House, while in favour of the removal of anomalies in Ministerial salaries provided that the aggregate charge was not increased, was of opinion that a reconsideration of the machinery of government and of the allocation of Ministers to departments should precede legislation of Ministerial remuneration, being defeated by a majority of 92 (228 votes to 136). We have already indicated, and do not propose to repeat, the main changes which the measure involves, but short reference may be made to matters of constitutional and legal importance ventilated in the course of the debate. Perhaps the most interesting of these is the appearance (on the assumption that the Bill passes the remaining stages) in a statute of the term "cabinet" for the first time, of "prime-minister" for the second time, and also the statutory association of the offices of premier and First Lord of the Treasury, thus affording legal recognition of a practice which, with minor interruptions, has obtained for some 100 years. Due prominence was given to these changes in the speech of the Home Secretary, who moved the second reading of the Bill, and whose words on the first point may be fittingly repeated here. In reference to cl. 3, Sir John Simon noted that for the first time in the history of the Constitution the word "cabinet" and the phrase

"cabinet minister" appeared. Hitherto, he said, there had been no means within the law of ascertaining who was a cabinet minister and who was not. Of course, a member of the cabinet was a member of the Privy Council, and if an individual had not previously been sworn of the Privy Council he would be sworn a member of the Privy Council when he was made a member of the cabinet. It was the solemn pledge by which he bound himself to guard cabinet secrets. Down to the present moment there was no provision in the law which either defined a cabinet minister or explained what he was. In future, the list of cabinet ministers would appear in the *London Gazette*, and the dates between which an individual was a cabinet minister would then be ascertained. Up to the present, all that had happened was that when a Prime Minister accepted from the Sovereign a commission to form a government, he submitted a list of ministers, at the top of which appeared those he professed to have as his cabinet colleagues, and the only way in which the dividing line was drawn was when you opened the paper the next morning and read "the above form the cabinet". It was, therefore, the Home Secretary said, an interesting moment in the historical and constitutional sense when Parliament this year for the first time took upon itself to define what a cabinet minister was.—*S.J., 1937, p. 305.*

Purposes of the Bill.—The same speaker pointed out that the Bill which followed the general lines of the recommendations of the Select Committees of the House of Commons, which reported in 1920 and 1930, had two purposes—the removal of anomalies in regard to the standing of certain administrative officers of State, and the simplification and improvement of the existing arrangements whereby ministers are distributed between the two Houses. On the latter point, he made reference to a statutory provision of the time of Queen Anne, designed to secure that there should not be in the House of Commons too many people who could be regarded as place men receiving pay as Ministers of the Crown. He drew attention to the special position of those sharing the Secretariate of State and to the distinction existing between Secretaries of State and Parliamentary Secretaries and to the difficulties to which the present somewhat complicated position had given rise. In regard to the other purpose of the Bill, attention was drawn to anomalies existing in regard to the salaries of the Secretary of State for Scotland, the Minister of Labour, and the Minister of Agriculture and Fisheries, while the desirability of equalising cabinet salaries was emphasised by reference to a recent statement by the Prime Minister who urged that it was altogether a wrong principle that there should be members of the cabinet receiving a certain sum as their salary and other members receiving 40 per cent. of that sum, in light of the fact that the cabinet was a body

of equals. The Prime Minister, Sir John Simon said, went on to point out that where a ministerial position carries a higher salary, it was naturally regarded as a more important position. That was the way of the world, and it was not in the interest of the best administration of the country that that should continue. Considerations of space forbid anything like an adequate treatment of other arguments advanced in favour of the Bill and demand a still more summary treatment of the views of the opposition, but it may, perhaps, be noted that according to Sir A. Sinclair, who agreed that certain ministers were underpaid, the Bill went far beyond the recommendations of the Select Committee with their suggestions for twelve ministers with salaries on the £5,000 level (not seventeen as under the Bill).—*S.J., 1937, p. 306.*

The Law Lords.—The last-named speaker, also, did not see why the law officers, who (as he said) when they left their party, returned to the Bar with enhanced prestige, should receive such large salaries and fees. Mr. Greenwood, "speaking as a layman," saw no reason why a lawyer, when he became a member of the Government, should receive fees in addition to his salary, and Mr. V. Adams (who thought that, if the salary which the Prime Minister was to receive was a proper one, the maintenance of the Lord Chancellor's salary was most improper), described the remuneration of the law officers as the most scandalous over-payment of all. Mr. Lees-Smith said that he had learned from inquiries among lawyers that there were very few in the legal profession who would not accept the position of a law officer and increase their salary by so doing, and suggested that the law officers expected a reversion to some highly-paid position like the Mastership of the Rolls, and pointed to the excellent example set by business men who entered the House and did not complain that nothing had been done for them because they did not get directorships. The Prime Minister, who did not think the occasion was one for pronouncement on the merits of the existing system of payment of law officers (who are not mentioned in the Bill), was more comforting. He had, he said, seen a great deal of the law officers in his time, and thought that the House had benefited from the experience of lawyers in the past. A *Times* leader on the Bill urged that so long as prizes open to the legal profession outside Parliament were so great, the effect of depriving the law officers of their fees would be to make those positions quite unattractive to lawyers of first rank, and with this observation our treatment of the subject may not inappropriately be concluded. —*S.J., 1937, p. 306.*

BOOK REVIEWS.

THE INDIAN COMPANIES ACT, third edition, by Kshetra Mohan Ghosh, Advocate, High Court, Calcutta, 1937. Price Rs. 10.

This is a comprehensive treatise on the Indian Companies Act. Since the appearance of the last edition of the book, the Indian Companies Amendment Act of 1936 was passed introducing a great number of far-reaching and important amendments to the Act of 1913. This has necessitated a re-writing of considerable portions of the book in the light of the amendments. The introduction at the opening gives a bird's eye view of the subject which will be useful to businessmen and beginners and students of law. Even in the introduction, the learned author has clearly pointed out the changes effected by the recent amendments to the Act. The commentaries of the Act as amended are full and the case-law has been brought up to date. The several appendices to the book give all the useful allied information. The numerous specimen forms given in the appendices will be found to be of special value to lawyers and businessmen. We have no doubt that the book will be found of great use by lawyers, judges and businessmen.

INDIAN LIMITATION ACT (ACT IX OF 1908) by Kumud Nath Bhaumik, B.A., B.L., with a foreword by the Honourable Mr. Justice Bijan Kumar Mukerji, M.A., B.L., of the Calcutta High Court, 1937. Price Rs. 5.

Mr. Bhaumik is familiar to lawyers as a writer on legal subjects. He has now brought out a Commentary on the Indian Limitation Act. The enactment is one on which there is a large growth of case-law every year and Mr. Bhaumik's book will be welcomed as an up to date text book on the Act. He does not rest content with giving references to the decided cases but sets out the principles underlying them. It is needless to say that even the latest amendments to the Act, such as Act XIV of 1937 have been incorporated in the book. There is a foreword to the book from the pen of Mr. Justice B. K. Mukerji of the Calcutta High Court. We have no doubt that the book will be found useful to the Bench and the Bar.

The above 2 books are published by the Eastern Law House, Calcutta.

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THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937

BY

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Scope.—The Hindu Women's Rights to Property Act has been hailed as opening a fresh chapter in the history of women's rights to property and while it has been criticised in some quarters as being revolutionary in character leading to a break up of the Hindu joint family system, according to others it is nothing more than a half-hearted attempt to tackle the problem of women's rights to property. Though the legislation is ambitiously described as the Hindu Women's Rights to Property Act, it deals directly only with the rights of the widow to the property of her husband and incidentally affords recognition of the rights of a pre-deceased son's wife and of the wife of a pre-deceased son's pre-deceased son. No doubt the Bill as introduced by Dr. Deshmukh contained provisions dealing with the position of the daughter in the line of heirs, but they were all withdrawn while the Bill was before the Select Committee of the Legislature. In fact it is stated in the report of the Select Committee:

"We have redrafted the Bill so as to confine the scope of its provisions within the limits foreshadowed in the discussions that took place when the motion for reference to Select Committee was before the House, that is to say, we have dealt *only with the question of giving extended rights to widows.*"

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S. 2 of the Act, however, contains language suggesting a wider scope for the enactment. It provides that when a Hindu dies intestate leaving separate property, the same shall devolve upon his widow along with his lineal descendants. It is well known that the expression "lineal descendants" includes sons as well as daughters. *Bhimnath Missir* v. *Sm. Tara Dasi*[1]. It would thus seem that the Act makes the widow, the sons as well as the daughters, equal sharers of the inheritance, there being nothing in the enactment to suggest any discrimination whatever between sons and daughters. However plausible such a construction may be the Act does not really warrant it. In fact, the expression 'lineal descendants', if literally understood, will take in not merely, the descendants in the first degree but all the descendants of a person irrespective of any question of degree or sex. It certainly cannot be the object of the Act to include all such persons. For one thing if the Legislature intended to introduce such a radical alteration in the existing principles of Hindu Law as regards the rights of daughters, and others, there would have been a specific declaration to that effect and the matter would not be left to mere implication. That apart in S. 3 (2), there is no provision for the daughter becoming entitled in any degree whatsoever to any interest which the deceased might have had in undivided joint family properties at the time of his death and the widow's case alone is provided for. Also S. 3 (3) defining the nature of the interest which a beneficiary under the Act is to take, in terms refers to a widow alone as such a beneficiary. Thus under the Act the only people to derive a benefit are (1) the widow, (2) the widow of a pre-deceased son, and (3) the widow of a pre-deceased son's predeceased son.

Commencement.—The Act does not prescribe any date for its commencement; hence under S. 5 (1) of the General Clauses Act (X of 1897), its provisions come into operation from the 14th of April, 1937, on which date it received the assent of the Governor-General. It is specifically enacted by S. 4 of the Act that its provisions will be inapplicable to the property of any Hindu dying intestate before that date.

Prior Law.—The scope of the Act, the nature and extent of the modifications it has introduced in the principles of

1. (1929) 57 M.L.J. 580: 30 L.W. 75 (P.C.).

Hindu Law as at present administered and the doubts and difficulties it has given rise to can all be appreciated by a brief reference to the prior state of the law. Under the Mithakshara which is followed with local variations by the Hindus almost all over India there exists a marked distinction between property of which a person is exclusively and absolutely seised, such as his self-acquisitions, and the interest which he may have in undivided joint family properties as one who on his birth had become entitled to a share therein. This distinction is vital, in as much as in the latter case according to the Mithakshara it is the family as a unit that constitutes the owner and the interest of each male member thereof is an inchoate right arising no doubt on his birth but capable of ascertainment only on partition and till then susceptible of variation regarding its density according as fresh sharers are born or existing sharers die. On the death of a Hindu male possessing both such types of property the law of inheritance operates regarding the former while there is no such thing as succession in the case of the undivided share which will simply lapse to the surviving sharers. If the deceased left a son, grandson, or great-grandson the latter will represent him in the family; else the collaterals get the benefit of survivorship. A woman had no rights regarding such property, apart from any question of maintenance, irrespective of the degree of kinship in which she stood to the deceased. In other words, women's rights of inheritance to the property of males depended essentially on the school of law by which the deceased was governed, whether he was a follower of one or the other of the two treatises, the Mithakshara and the Dayabhaga.

According to the Dayabhaga which is followed by a majority of the Hindus in Bengal, a person has absolute powers both over his acquisitions as well as over property which he along with his kinsmen may have inherited from his forefathers and in respect of which there has as yet been no division by metes and bounds among the sharers. Under that system a sharer does not acquire by his birth any interest in the property of his father or other ancestors but gets such interest only by and on the death of the latter, and then he takes a fixed, absolute and invariable interest. The result is that on his own death all his properties to whatever category they belong devolve by inheritance only on his heirs, and there is no

such thing as a coparcenership with rights of survivorship *inter se* among the members. Thus while under the Dayabhaga all the properties of a person pass by inheritance on his death, under the Mithakshara the rules of inheritance apply only as regards property of which the deceased was the absolute owner.

When succession fell in, both under the Mithakshara and the Dayabhaga, the wife became the heir only in default of son, grandson, or great-grandson and she took only if she had been chaste up to that time. Hers was a qualified estate, defeasible on (1) an adoption, or (2) re-marriage, or (3) surrender by her in favour of the nearest reversioners, or (4) by her death. She can enjoy the usufruct but cannot alienate the corpus in the absence of legal necessity. If the deceased had left sons, then on a partition among them the wife of the deceased was ordinarily entitled to a share equal to that of a son. She had however no independent right to call for a partition, and till that event she will have a right to maintenance only. A certain amount of difference in judicial opinion exists regarding the application of this principle, as for instance where a person died leaving more than one wife and sons by all or some or one of them, or where after the death of a person the partition was as between his sons and his grandsons by pre-deceased sons, etc. Be that as it may, the practice by which the wife of a deceased person was allotted on a partition among his sons a share equal to that of a son is held to be obsolete in Madras, and under the Dayabhaga law depends on whether she is a mother or a childless wife. Where she had no right to a share, she had generally a right to maintenance.

Changes effected by the Act.—The Hindu Women's Rights to Property Act effects important changes both in the law governing the devolution of a person's separate property as well as in the law governing the interest which he might have in undivided joint family properties. As regards the separate property of a person, in place of the provision that a widow can take only in default of a son, grandson, or great-grandson, the Act provides that the widow shall be entitled to a share in the inheritance *along* with such persons. Secondly, the Act confers for the first time in all provinces of India and under

all schools of law a heritable capacity on the widow of a pre-deceased son and the widow of a pre-deceased son's pre-deceased son. It also gives them a very high rank in the line of heirs in that they are permitted to share the inheritance along with the widow and the sons, grandsons, and great-grandsons of the deceased superseding even his daughter and daughter's son. Though the wording of S. 2, that the provisions of S. 3 the section which confers the rights specified *supra* shall notwithstanding any rule of Hindu law or custom to the contrary apply where a Hindu dies intestate leaving a widow, seems to suggest that S. 3 may not apply where the deceased had left no widow but only the widow of a pre-deceased son or the widow of a pre-deceased son's pre-deceased son, either exclusively or along with his lineal male descendants, still, reading S. 3 as a whole it is clear that the provisions of the Act will equally apply in all the above cases.

As regards the *quantum* of interest which these heirs take, the Act makes it clear that the widow is to have the same share as a son. The widow of a pre-deceased son will take the share of a son of the deceased if no son of her own husband survived the deceased; otherwise she will take the share of a son's son. A similar provision is made as regards the share of the widow of the pre-deceased son's pre-deceased son.

By sub-S. 3 of S. 3 it is provided that the widow, the pre-deceased son's widow, and the widow of a pre-deceased son's pre-deceased son shall have a right to call for a partition after the inheritance has fallen in.

Where the deceased had an interest in undivided joint family properties the Act lays down that his wife can represent him *quoad* such properties and shall be entitled as against the other members of the coparcenary, be they collaterals or lineal descendants or ascendants, to call for a partition and obtain her husband's share in such properties.

The Act further provides, that whatever be the character of the property which the widow gets on her husband's death, it is only the limited or qualified estate usually known as a Hindu Woman's estate, an estate of enjoyment only without any power of disposition normally, that she will have therein.

Difficulties in Construction.—Such in brief are the changes made. Unfortunately the Act has afforded room for much controversy both as regards the spirit underlying it as also with reference to the interpretation of its provisions. It might thus be urged that there is absolutely no justification for superseding the daughters in the line of heirs by the widow of the pre-deceased son and the widow of the pre-deceased son's pre-deceased son. The daughter is of the very flesh and blood of the deceased and bound to him by ties of natural affection; while *ex hypothesi* the widowed daughter-in-law has no such paramount and compelling reason in her favour. Another criticism to which the Act is open is that it perpetuates the distinction between female heirs and others obtaining for long in Hindu Law by specifically enacting that the female heirs mentioned in the Act shall take only the limited interest known as a Hindu Woman's estate. In Hindu Law itself it has been felt that the doctrine of limited estate for female heirs was the result of the early contact of the European Judges with the doctrines of the Dayabhaga and the erroneous impression entertained by them as to its place among the authoritative treatises expounding the principles of law applicable to the Hindus. In view of the subsequent recognition by the Privy Council that it is the Mithakshara which "is respected all over India" (*Buddha Singh* v. *Laltu Singh*[1]) and in view of the fact that by its comprehensive definition of stridhana taking in inherited property as well as property coming to a woman on a partition as her absolute property, the Mithakshara has "placed women almost on a footing of equality with men as regards their capacity to hold property" (*Salemma* v. *Lutchmana Reddi*[2]) and having regard to the changed conditions of Hindu social life the perpetuation of the theory of limited estate for women in inherited property seems to be absolutely indefensible.

The Act does not define clearly the tenure in which a widow inheriting the property of the deceased along with his lineal descendants will hold it. From the expression "in like manner as it devolves upon a son" in S. 3 (1) it has to be understood that the tenancy will be either a joint tenancy or

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1. (1915) 29 M.L.J. 434: L.R. 42 I.A. 208: I.L.R. 37 All. 604 (P.C.).
2. (1897) 8 M.L.J. 14: I.L.R. 21 Mad. 100.

tenancy-in-common with the co-heirs according as the latter were undivided or divided at the moment the succession fell in and according as the parties were governed by the Mithakshara or the Dayabhaga. Thus in all provinces subject to the Mithakshara law, if after inheriting the property as joint tenants and before any partition is effected among the co-heirs, any of them dies, whether it be the widow or any of the lineal descendants of the deceased, the interest of such co-heir would survive to the rest. Where however the co-heirs had taken the inheritance as tenants-in-common, then on the death of the widow subsequently, she having only a life estate under the Act, succession will once again open to her husband and his heirs at that time would succeed to such interest.

The Act abrogates the rule of Hindu Law that chastity is a *sine qua non* to a widow's heritable capacity. At the same time it creates a position of some difficulty regarding a widow who re-marries after inheriting to her husband or becoming entitled to any interest which he may have in undivided joint family properties. It has been held by all the High Courts at any rate in cases where the widow of a Hindu contracts a re-marriage under the provisions of the Hindu Widows' Re-marriage Act, that there will be an immediate forfeiture of the estate which she had taken from her first husband. S. 2 of the latter Act states:

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died."

It is clear that this penal provision will not affect any interest which the widow might become entitled to under the provisions of the Hindu Women's Rights to Property Act of 1937 in the undivided joint family properties of her husband's family. It will therefore be a matter for argument whether the provision in this last Act that the interest taken by the widow under the Act in the properties of the deceased shall be the limited interest known as a "Hindu woman's estate" would carry with it the limitation obtaining under the general principles of Hindu Law in the case of widows only, namely, that she will be divested of the properties coming to her on her husband's death, the moment she ceases to be his surviving

half or his representative in law. Again according to S. 1 of the Act of 1937 the Act is called the Hindu Women's Rights to Property Act. This seems to postulate that it is the rights of *Hindu* women only that are declared. Where prior to her husband's death the wife had become an apostate to Hinduism, no doubt by the operation of the provisions of the Freedom of Religion Act of 1850 her rights of inheritance will be saved but it will be a question of some nicety whether that Act can be construed as guaranteeing to her rights which she did not have under the Hindu Law as it stood before 1850, such as the right which is now for the first time conferred on her by the Act of 1937 to the interest possessed by her husband in the undivided joint family properties of the family of which he was a member. S. 3 (2) provides for a widow representing her deceased husband in the joint family of which he was a member *quoad* the interest which he had as such member, provided he had died *intestate*. This last term in the context is unintelligible, for, it is well known that there can be no testamentary disposition of an interest in coparcenary property possessed by a member of a Mitakshara joint Hindu family. Does the Act really contemplate the abrogation of this principle of law and seek to confer under the guise of this section a right of testamentary disposition over such interest in joint family property? Obviously to so hold would give rise to anomalies. It is well established that a member of a joint Hindu family cannot alienate his interest in coparcenary property by way of gift in Madras and Bombay and even for value in other provinces. It is equally well understood that the right of testamentary disposition is more or less co-extensive with the capacity to make a gift *inter vivos*. That being so it cannot be that what a man cannot do *inter vivos* can be done by him by a testamentary disposition. It would therefore seem that the condition in S. 3 (2) of the Act that the Hindu should have died intestate as regards his undivided interest in the joint family property is really language loosely used.

A question fraught with greater difficulty raised by S. 3 (2) is as regards the availability of the husband's interest in the joint family properties, in the hands of his widow for the satisfaction of his debts. It is a long established rule that in respect of debts contracted by a coparcener, unless the creditor

had obtained a decree and in execution thereof attached the undivided coparcenary interest of his debtor during the latter's lifetime, he cannot proceed against such interest after the debtor's death, inasmuch as survivorship operates to defeat such rights (*Suraj Bansi's* case). It is equally clear that the remedies available to a creditor in respect of the undivided coparcenary interest of his debtor are the result of purely equitable considerations and not founded upon the power of the debtor himself to deal with such interest (*Deendayal* v. *Jugdeep Narain Singh*[1]). It would thus seem that when the widow becomes entitled by virtue of S. 3 (2) to her deceased husband's interest in the coparcenary properties on his death, she takes such interest free from any liability to pay his debts. Even as such interest will not be available to the creditor when it has passed by survivorship to collateral coparceners it would seem that the same result must follow where the interest passes to the widow under S. 3 (2). There are however difficulties in accepting this conclusion. The widow takes not by survivorship but by statutory provision. The Act has laid down that the widow shall have in the property *the same interest* as the husband himself had. According to the Concise Oxford Dictionary the word *same* means "identical, not different". According to Webster it means "not different in kind, like in quality or qualities, indistinguishably alike, identical". If this is the sense in which the expression *same* is used in the Act, it is as if the Act is merely extending the personality of the husband in the person of his wife, in other words, the wife shall have exactly similar powers and liabilities *quoad* the husband's undivided interest as the husband himself had subject only to the specific limitation contained in sub-S. (3) as regards the nature of such interest for purposes of enjoyment. The Act not having exempted such interest from availability to the creditors, it seems to follow that that interest will continue to be available to them even in the hands of the widow. It is perfectly true that the Act will thus by implication be conferring on the creditors a boon. It is however to be remembered that the Hindu Law always regards the non-payment of debts as a sin and therefore scrupulously requires the payment of debts before the effects of a deceased

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1. (1877) L.R. 4 I.A. 247: I.L.R. 3 C. 198 at 209 (P.C.).

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THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT.

INTRODUCTORY.

The supervision and protection of public trusts is an important function of government. Accordingly when the British Government became established in India the temples were managed by the Revenue Department, with the Board of Revenue at the top. Managers under the control of the Revenue Officers were in direct charge of temples. Even now, *charitable* trusts are thus controlled. For this purpose government did not levy any tax or contribution from the temple funds. The government management was on the whole satisfactory and beneficial to the temples.

About the middle of the 19th Century, the Christian Missionaries strongly agitated and protested in England and in India against the management of the *heathen* temples by the *Christian* government. In the result, the Indian government resolved to divest itself of the control over temples, and transfer the same to individuals or committees. Transfer to such individuals gave rise to the system of hereditary trustees in the case of important temples, who have since developed into practical masters of the institutions. The temple committees were constituted under Act X of 1863 (Government of India). The members of the committee were appointed by District Judges; and the committees appointed trustees to the temples made over to them.

There were also temples which never came under the control of Government, and were not affected by this Act. Their number, of course, is daily increasing.

That Act, however, was very defective. The rights, duties and liabilities of trustees were not defined. It was impossible for the committee to control effectively the trustees, and for the

latter, the temple servants, except through wearisome and costly litigation. In such cases, the trustee in possession had always an advantage by reason of the possession of the temple funds. The committee members and trustees held office for life unless removed by the Court. There were no effective means of enforcing the obligation of the trustees to furnish accounts nor was there any provision to get the accounts audited!

These and similar defects became apparent very soon after the passing of the above Act; and demands were made for its drastic amendment. Government appointed from time to time, beginning from 1874, committees to draft amending bills, with eminent men like Dewan Ramaiengar, Justice Muthuswami Iyer and Dewan Bahadur S. Srinivasaraghava Iyengar at the head; and several proposals were made. Nevertheless, government would not or could not put any legislation through, until the Montford Reforms came and a sort of democracy was established. The late Rajah of Panagal had thus the opportunity for supplying a long-felt want and earn the gratitude of the public. He had the advantage of being at the head of a government representative of the people concerned in the protection of temples, unfettered by the limitations of a foreign and christian rule. But he had also the handicap of leading a party based on communalistic ideas whose prejudices he could not altogether disregard.

The Object of the Act.

It was claimed for the Act passed by him that it was designed (*i*) to ensure the *efficient management* and protection of Religious Endowments, and (*ii*) to prevent *wasteful litigation* in respect of them. It limited the terms of office of the members of committees and trustees of temples to five years. Their respective rights and duties have been in a way defined; and disciplinary powers are given to committees over trustees, and to the latter over temple servants. The trustees are required to keep regular accounts and provision is made for their periodical audit. The trustees are further under obligation to maintain proper registers of temple properties and also to submit budgets regarding the annual income and expenditure of the temple before the year commences. The trustees should not alienate temple properties without the previous sanction of the Board. There are also other provisions which need not be recounted here. If properly carried out, these provisions are bound to ensure the achievement of the first of the above objects.

Tax on Temple Income.

As against all this, the Act has, for the first time, introduced element of taxation on the temple funds, to get a duty performed otherwise, which the Government itself is bound to do. On the *gross* income of temples, 1½ per cent. is levied to meet the expenses of the Board, 1½ per cent. for the committee, and by the latest amending Act another 1½ per cent. to meet audit expenses. Thus 4½ per cent. of the *gross income* of temples is taken away from them. The question is therefore naturally asked, whether temples have received advantages under the new dispensation, in proportion to the taxes paid by them, which many temples cannot do without detriment to their own maintenance.

Litigation Expenses.

The second of the claims, namely, the prevention of *wasteful litigation,* has become practically frustrated, in the actual working of the enactment. No doubt, litigation of the older sort between trustees and committees, and trustees and temple servants have become rare. But litigations of a different sort, and which must be said to be equally *wasteful* and *avoidable,* have cropped up throughout the Presidency, consequent on the orders of the Board under this Act. Under section 68, the Board is entitled to levy from the temples concerned, *all the expenses* (not merely Court costs) in respect of *all* its litigation—by it or against it—no matter whether it succeeds or fails in its enterprises; and this is recoverable under section 70, like land revenue from the concerned temple's properties. The Board's budgets under Law charges will show that this amount is on the average Rs. 25 to 30 thousands a year; and this is exclusive of the special expenses in respect of the *archaka suits* in Northern Circars for which large special loans were obtained from government and repaid with interest. In all such cases, the trustees concerned also take equal, if not larger amounts from temple funds for their own expenses. What is the total thus spent from the temple monies during these 12 years of the working of the New Act? Would it not be at least Rs. 10 lacs and what is the corresponding benefit? Very large sums spent by the Board in such litigation still remain unrecovered or irrecoverable from the institutions concerned. Be it noted that all this is in addition to the 4½ per cent. levy on the *gross* income as already stated. In the "critical review" of this Act contributed by me early in 1925, to the Madras Law Weekly, in which I took exception to the investing of the Board with judicial functions, providing for the dissatisfied party to take the matter to Courts,

I drew attention to the strong objections against such a measure and stated "This will not only *add* to litigation but also give rise to frequent abuse of legal process." It is worth while to examine whether my apprehensions were not justified in experience. I then suggested that the functions of the Board should be limited to administration only. Another class of litigation, comprises suits, etc., between rival sectarian factions, especially in Vishnu temples which have really nothing to do with the temple services as laid down in the *sastras*. Trustees often side with one or the other of these factions and freely make use of the temple funds in such fights; and the Board not infrequently gets involved in them, through its inherent powers being invoked by one party or another. Section 79 which is designed to prevent the Board, the committee or the trustee from having anything to do with such matters, is not infrequently interpreted so as to lead to the opposite result.

Principal Objection to the Act.

The main and the most weighty objection to Act was with reference to the creation of the Endowment Board and investing it with judicial functions which appropriately belong to Courts, without, at the same time, subjecting the Board to the rules of evidence and procedure which bind the Courts. No doubt by the rules made under the Endowments Act, certain rules are prescribed for the conduct of enquiries before it. But they offer no impediment to the free exercise of power by the Board without resort to judicial procedure. In a case under the Act reported in *Sri Iswarananda Bharathi Swami* v. *H. R. E. Board, Madras,*[1] his Lordship Anantakrishna Iyer, J., drew attention to the rule which runs thus: "It shall not be necessary to take down the evidence of the witness in writing at length, but as the examination of each witness proceeds a memorandum of the substance of what each witness deposes shall be written and signed by the presiding Commissioner, or by the Commissioner, as the case may be, and shall form part of the record", and was of opinion that therefore the decision of the Board could not be said to be that of a 'judicial tribunal'. His Lordship Reilly, J., after noting that "only one of the members of the Board need be a person of any legal training or experience", further observed on the procedure adopted by the Board thus: "There need be no pleadings on record. Evidence need not be given an oath, and none need be recorded. No reason need be given for the decision. No pleader need be heard. The pro-

1. (1932) 63 M.L.J. 254: I.L.R. 56 Mad. 40.

ceedings need not be conducted in public. The local Government by rules and the Board itself by bye-laws have provided for some of these things; but they need not have done so." At the same time it cannot be denied that the Board, in the actual administration of the salutary provisions of the Act, not infrequently meet with experiences, which would seem to justify its possessing summary and drastic powers if it were to function at all for the benefit of the institutions under its control. This is because of the Religious Endowments becoming somehow involved in politics directly or indirectly and being exploited by the adherents or partisans of the party in power.

Lord Reading saw the mistake of taking away the common law right of seeking relief in Court and of making the arbitrary decisions of an essentially administrative body final. While giving assent to the Act, he observed that "he could not shut his eyes to the fact that there is a large amount of *dissatisfaction* and *apprehension* in regard to some portions of the Act". The italics are mine. He, therefore, made provisions in the Act for certain matters being taken to Court by a party who was dissatisfied and aggrieved with orders of the Board. He further advised the Minister and the Council to introduce suitable amending bills to cure the serious defects pointed out, and for obvious reasons. Temple property is not like private property; and there may not be many to risk their own money and trouble merely to safeguard temple interests. But this never came to pass. On the other hand amending bills of a different character, culminating in what was called the "Koti Reddi Bill" were passed from time to time by the party Council to augment the powers of the Endowments Board and in effect secure its actions against intervention by Courts.

It is neither just nor equitable nor warranted by the exigencies of the Religious Endowments themselves to curtail the ordinary jurisdiction of Civil Courts. From the nature of things and in the situation in which the Endowment Board finds itself, arbitrary action is often inevitable; and when it yields to it, it comes in for the remarks of the public and of the Courts. In one case in Madura, commenting on the action of the Board Mr. (now Justice) Wadsworth, the District Judge, observed "now, I think it must be assumed in favour of the Board that there was no intention to act illegally. We must, I think, also assume that the Board did not intend to use the somewhat vague phraseology of section 18 as a cloak for *arbitrary* and *illegal* action".[1]

1. M.P. No. 399 of 1933 in O.S. No. 4 of 1922, District Court, Madura.

Comment on this is needless. The natural reaction was to reduce the powers of the Courts over the Board to as small a minimum as possible; and this has been done by the amendments referred to above. At present the Board possesses practically unlimited powers over Religious Endowments. More of this later on. Quite recently in a matter in which the Board was alleged to have acted illegally, his Lordship Pandrang Row, J., ruled that even the High Court could not give relief by way of writ, as the act complained against, was "administrative" only.[1]

Opposition to Panagal's Bill.

Such being the nature of this new Law, it met with objections from all quarters, from the very beginning. In the select committee to the Bill, were the veteran lawyers and politicians, the late Messrs. Govindaraghava Iyer and M. Ramachandra Rao, who strongly expressed themselves, among other things, against the investing of the Board with judicial powers; and the protest was continued in the Council discussions and outside by the public. The Rajah got over it not merely by his party votes, but also by a promise to bring in a suitable amending bill at an early date. (But he never became Minister again.) *Vested* interests of which there were very many even within his own party, were pacified by the demarcation of certain temples as "excepted", over which the Board alone could exercise power and even then only to a very limited extent. Another powerful opposition was from the heads of *Maths,* which were for the first time declared trusts and brought under the purview of the Act. The heads of the more important maths after waiting in deputations on the Governor and the Viceroy, filed suits in the High Court questioning the validity of the Act in so far as they were concerned. The Act has a provision (Section 3) under which government can exempt any religious institution wholly or in part, from its application. By a judicious use of this power, the Raja effected peace with the said Mathadhipathis, who thereupon withdrew their suits.

Judicial Functions of the Board.

1. SETTLEMENT OF SCHEMES.

During the long period when the Act XX of 1863 was in force, the only way of setting right the affairs of mismanaged temples was by settling schemes of management by Courts, at the instance of persons interested in them. The trustees, with the resources of the temples in their hands, used to resist the

1. *Sreenivasa Aiyangar* v. *H. R. E. Board, Madras,* (1937) 1 M.L.J. 442.

same as far as possible. For obvious reasons, suits for schemes in many cases ended in compromise schemes, not altogether satisfactory. Nevertheless they have served well and should not be lightly interfered with. In the present Act, therefore, while the power to settle schemes is transferred to the Board, schemes already made by Courts cannot be touched except by the Court itself. [Section 75 read with Section 57 (4) and Section 64.] The schemes settled by the Board are liable to be taken to Courts for cancellation or modification; and when this is done, the Court alone can thereafter deal with such schemes. Many schemes have gone up to the High Court and even to the Privy Council.

In framing a regular and detailed law for the administration of temples, there should be no need for still resorting to the process of settling schemes for their management. The Act should be self-sufficient. Provisions for schemes of management are not found in the laws of local Boards or Municipalities or even Village Panchayats though local conditions differ. After all, schemes only provide for the periodical appointment of trustees and the manner in which such appointment should be made, for the maintenance of regular accounts and their audit, for the appointment of paid managers and treasurers, for directions for the management of the temple properties and the like. When the Government was itself managing temples, there was no scheme. In Mysore the Muzrai Department, which is only the Revenue Department, controls the management of temples in the same manner in which it does the other public departments. No contribution is levied from temples for this purpose.

The retention of the power of settling schemes, in the Act, is therefore an anomaly. It was perhaps necessitated by its defects in other respects.

In effect, it sets the Board free from the control of Courts and even of Government. It can now, notwithstanding the other provisions of the Act, by way of settling schemes, remove trustees hereditary or non-hereditary otherwise entitled to remain in office, appoint new trustees, add to or diminish their number, define the powers and duties of trustees in their own way and appoint salaried executive officers, with powers which may conflict with or override those of trustees under the Law. How this last could be done in the face of statutory responsibilities of trustees singly or jointly and severally, it is not easy to understand. These may happen to excepted temples also, although a previous chapter of the Act lays down limits for the powers

of the Board over them. (Ss. 5 and 6, amending Ss. 57 and 63 of Act II of 1927.)

2. NOTIFICATION OF TEMPLES.

The most drastic amendment to the Endowment Act is the one relating to "Notification" of temples. It is like the promulgation of *Martial Law* suspending normal Government, but with this difference that while the application of the *Martial Law* may be withdrawn sooner or later, there is no provision for recalling the notification of a temple and restoring it to ordinary administration! The predominant idea in this is the getting rid of the Court or Government intervention thereafter with the actions of the Board! This is contained in the new Chapter VI-A of the Act. (S. 65-A.)

Under it, the Board may for its own reasons after making an enquiry, of course in the usual manner, decide by a committee of three Commissioners (out of five, the full number) that a temple shall be *notified* in the *Fort St. George Gazette.* An appeal may be made against this decision to the Full Board, but with what effect heaven knows, when the majority of it has given the original decision! Neither Government nor Courts can question it; and the Government is bound to publish such notification. When this is done, all schemes of temples already settled, whether by the Board or Courts up to the Privy Council, to any temple or endowment and all rules thereunder *cease* to apply to them. Committees cease to have jurisdiction over such temples, they coming directly under the orders of the Board thereafter. The contribution payable to the committee goes to augment that of the Board. The Board, moreover, gets power to appoint salaried executive officers for notified temples and invest them with such powers as it would, and pay their salaries out of the temple funds. Put briefly, the effect of the notification of a temple is to remove it from the application of the normal provisions of the Law and the Endowment Act, and leave it to be governed by such directions as the Board may issue!

There is absolutely no justification for investing the Board an ordinary administrative body, with such arbitrary and uncontrolled powers over temples and their endowments. If the trustee misbehaves, he is subject to disciplinary action. If the Committee misbehaves, the Board may, subject to the procedure laid down, perform all or any such duties left unperformed by it. Government has power to abolish committees. There are Courts to protect the civil rights of aggrieved parties. One may rightly ask, how the Board is qualified to summarily do away with the

schemes even of the highest Courts, settled at considerable cost of money, time and labour; and whether one would like his own personal rights affected and personal matters settled in the same summary manner? What is the great public danger which should be averted so urgently and so autocratically?

The Court schemes are a bug-bear to the Board as they reserve certain powers with the Courts, such as the appointment of paid trustees to important temples and the regulation of the appointment of honorary trustees thereto and giving directions to them. Some times valid reasons may not be found to induce Courts to modify their schemes as the Board would desire; and the modification, if any, could be effected only by suits. Committees and trustees considered undesirable cannot be removed easily in the usual course. The scope that the new procedure affords for exercise of patronage must necessarily have its psychological effect. The net result has been a wide resort to this procedure. It is understood that at present notification proceedings are pending before the Board against a very large number of temples. Government would do well to call for them and examine the "reasons" assigned by the Board for starting them, and satisfy itself regarding the necessity for such drastic steps.

Giving the Board such a power is both unnecessary and unwarranted. The exercise of such arbitrary powers can never escape, at any rate, the charge of political or party influence.

3. Application of the Surplus Funds.

Another important power of the Board is that which enables it to declare that there are surplus funds in religious institutions and to direct such surplus to be "appropriated to religious, educational or charitable purposes *not inconsistent* with the objects of such math or temple." (S. 67.) This is pre-eminently a function of the civil court bound by the laws of procedure and evidence, apart from the "purposes" indicated above. There has been a great deal of opposition to this provision. Even under the English Law such diversions can be made only in respect of *charitable* endowments, as distinguished from religious endowments—temples and maths with us. I repeat what I said in 1925 in the article referred to above. It is this: "It is unthinkable to a Hindu unsophisticated with western notions that a temple or math can "cease to exist" or "its purpose can become impossible of realisation," or "the machinery to carry it out fails" or a "surplus will be left which will not be required for their purpose". There is no limit to what may be spent on a temple or a

guru. To spend such *surplus* if *any* even on purposes of *religion,* etc., *not inconsistent* with the objects of such math or temple will do violence to Hindu religious sentiments." If such diversions be permissible at all, it should be only in favour of purposes "consistent" with the original objects of the endowments and not otherwise.

There was a regulation of 1817, which enabled Government to utilise the surplus temple monies for building hospitals, making roads, constructing bridges, and for similar works of public utility. It was repealed by the Panagal Act rightly. But the wrong has been perpetrated, though in a different manner in the new Act also, under this section.

In any event, the transfer of that power from the Court to the Board which is not bound by any law of procedure or evidence even to decide in the first instance, cannot be justified even on the ground of expediency.

Alienation of Temple Property.

This is a serious affair. Under the present Act the trustee is enabled to do it with the sanction of the Board. (S. 76.) Ordinarily the trustee has responsibility, both civil and criminal, in intermeddling with the trust property. The temple interests would be safeguarded, only if such responsibility is left intact. If, on the other hand, as the Endowment Act has done, it is made possible for the trustees and the Board to deal freely with trust properties leaving persons "having interest" to take the matter to the Court if they would, where is real protection against improper alienations? Why not leave it to the Court itself to permit or not the trustee to dispose of temple properties within the limits of law? The same responsibility should be borne by the trustees in lending out temple monies or purchasing properties out of them or otherwise investing the same. A summary mode of approaching Courts by an application may with advantage be substituted for the present procedure.

Other Judicial Functions of the Endowment Board.

One of the functions which occupies a considerable time of the Board and involves a lot of litigation, is laid down in S. 84 of the Act. Under it the Board has to decide whether an institution is a math or temple as defined by the Act (*i.e.,* Public) and whether a temple is excepted. The original definition of "excepted temples" which was intended to give protection to temples which never came under the supervision of Government before it divested itself of direct management, was amended subsequently, with

the result that it has given rise to unexpected results, and strange claims to hereditary trusteeship!

Another section (77) enables the Board to allocate between religious and secular trusts, when the Endowment happens to be mixed up.

There are other sundry items also which need not be stated here.

The Functions of the Endowment Board.

Section 18 of the Endowments Act sets forth the purpose for which the Board is constituted. It is the "superintendence" of Religious Endowments and the "doing of all things reasonable and necessary to ensure that they are properly administered and duly appropriated to the purposes for which they were founded or exist". In practice this primary function of the Board is thrown into the back ground and its time and resources are spent mostly on extraneous judicial, quasi-judicial, and other work, which have given rise to huge "wasteful and avoidable litigation" as already indicated, and made the Board unpopular. There seems to be no virtue in calling upon people all over the Presidency to go over to Madras at great expense and trouble to take summary decisions from the Board and then put them again into the Courts in their own place if they chose!

Even the normal business of the Board as defined in S. 18, is far too much for a single Board. It has really as much work as the Board of Revenue has and would require a staff—at Madras, the Districts and Taluqs—similar to that of the latter. How is that to be obtained? Already about 20,000 temples have been brought into the list; and there may be many more. The administration reports of the Board show that the largest number of temples visited by a Commissioner during a year never exceeded 130. The District Staff of the Board consists of a solitary miserable Inspector or Assistant Inspector! Indeed such difficulties have been anticipated; and S. 10 of the Act provides for the creation of more Boards than one, which would have come into existence if only money had become available.

The idea of a *Central Board* was long ago mooted in some of the old committees appointed for the revision of Act XX of 1863 as a necessary alternative for government refusing to have direct control of the temples. The *pros* and *cons* regarding the desirability and the utility of such a Board were thoroughly threshed out and the idea was finally abandoned as early as 1893 by the Muthuswami Iyer Committee. Raja of Panagal's Bill

too did not have it in the first draft. The idea suddenly came up only during the sittings of the select committee. There has been strong opinion against it and it has been viewed as a place of patronage for the party in power.

In one of my discussions on the present Endowment Act with the late Dewan Bahadur Muniswami Naidu Garu, sometime Chief Minister, he opined that the position of the Endowment Board was like that of the Police Commissioner, it being required to pass orders without loss of time, leaving any mistakes to be righted by Courts in due time. With respect, I differed, from him, for reasons principally that the Board (I was in it then) cannot be confronted with such emergencies as the police may encounter and that temples being nobody's private property and politics largely interfering in their administration, individuals who would and could pursue the matter in Courts of Law, would be forthcoming only very rarely and many wrongs would go unredressed. I think I was not mistaken; and my view may be found to have proved right in the light of experience.

TEMPLE COMMITTEES.

For several years now, there have been no committees in about 20 districts. It cannot be said that temples therein have suffered for their absence. The reason is obvious. Politics, has less interfered with them, than where committees are functioning. There, the inevitable faction spirit prevails and even the handds of the Board are often stayed. When the Government was directly managing temples, there were no temple committees. They were created by the Act of 1863 to take the place of Government. But when a salaried Central Board was created there was no longer need for this buffer between it and the trustees. I have laid stress on this point in my review of 1925 referred to above. The Board and Government have since realised it, and that apparently accounts for Government's omission, in spite of the imperative provisions of the Endowment Act, to constitute committees for the Districts without them. It might have been inconvenient too for a party government and its adherents to risk elections for the committees as laid down by the law; nevertheless it has to be said that there is no regret in any quarter for the paucity of these bodies. In any event, either the Board or the Committee is a superfluity in the presence of the one or the other of them.

As with the Board, with the Committee also, there is the handicap of finance. It meets but once a month and appoints trustees to temples. It can do no more. It has not got adequate

staff to efficiently superintend the affairs of the temple under it, which range from about 250 to 1000 and more in number.

THE ALTERNATIVE PROPOSAL.

Reversion to the state of affairs before the Panagal Act is out of question and is liked by no one. The setting up of an independent machinery at Madras efficient and adequate to control and supervise the Religious Endowments all over the Presidency, is possible only at a prohibitive cost. It is not proper to tax temples for that purpose; and there is a limit even to such taxation. A careful perusal of the Board's annual demands at present, will show that with such income even if fully realised during the year, it is very difficult to balance even the present budget. The large collection of contributions now by coercive process through the Revenue department represents the arrears of several past years. It will soon be over.

Further it may not be practical politics to expect provision for the required money therefor from Provincial Revenues.

Nevertheless, government cannot escape its responsibility with reference to temple trusts. Provincial autonomy is come and government is no longer merely "Christian". It must devise a means for discharging its duties in this direction, which will not involve much cost and which would at the same time be fairly efficient.

The best course for it seems to be, to revert to direct management of the Religious Endowments through the Revenue department, as in the early days of the British Government in India, with such changes in policy and action as may be found necessary to suit the present conditions.

The revenue department is amply manned from village officers at the bottom to the Revenue Board, at the top; and it would be very easy to control the secular administration of temples through them. Responsible Managers may be appointed for the immediate management of temples and they may be paid from their funds. For temples without sufficient income, other arrangements may be made. Unlike committees and trustees, such managers will be subject to official discipline and rules of conduct. Temples will become free from sectarian quarrels and litigations would come under direct state control. The influence of politics on them will become minimised.

To cope with the slight extra work that may fall upon the Taluq office or the collectorate on this account, an additional clerk may be appointed to each of them and paid, if necessary, by a trifling levy on the temple incomes, though the proper course

would be for the government to bear such charges. To keep government in touch with the administration of the temples, an officer like the Inspector of Municipalities and Panchayats may be appointed, with some necessary establishment. The present staff of the Endowment Board's office may be absorbed into these services with advantage.

Such a system prevails in Mysore. An Assistant Secretary to government is the only additional officer employed for the muzrai (Devasthanam) department. The ordinary Revenue Staff control the affairs of temples. The temples there are said to be never involved in litigations of the sort we find here; and even rents of lands are said to be recovered from the defaulters like arrears of Revenue.

If, however, the Board is continued, it is necessary to confine its activities to administration only, as defined in S. 18 of the Endowments Act. Its members should be men of mature experience, having reverence for and abiding faith and knowledge in the religion of temples and outlooks for their being conducted in an ideal manner. Provisions should be made to ensure that the spirit of faction, communal or otherwise which disfigures other public bodies, has no entrance into it in any manner.

Moreover, when the Board is made a purely administrative body there is no meaning in centralising it at Madras. Territorial divisions of the Presidency should be fixed as in the other departments of the State. The Commissioner for each division should have his office within it and be responsible for its administration. Under such arrangement, there is no need for any "Committee" of Commissioners to transact any business.

HONOURS AND SECTARIAN CLAIMS.

In a dispute for first honours between rival Matadhipathis the Madras High Court, both in its original and appellate sides held recently that a claim for honours was not a civil right and so no action lay.[1] Nothing daunted, one of them went back to the Endowment Board; and in spite of conflicting orders from different committees therein, got an order from one of them in his favour. Against this, a writ proceedings was taken in the High Court by his rival, but without success. We read in the papers that during a festival in the temple concerned some months ago, both the contending swamiars were prevented from visiting the temple by the Superintendent of Police!

1. Appeal against C.S. No. 306 of 1927. *Sri Vanamamalai Jeeyar Swamigal* v. *The Board of Commissioners for the H.R.E.*, (1934) 69 M.L.J. 14 and *Sri Emberumanar Jeer Swamigal* v. *The Board of Commissioners for Hindu Religious Endowments*, (1936) 71 M.L.J. 588.

This is enough to illustrate the hideous length to which scramblers for honours would go and the risks and compromises to which they would expose themselves, in their eagerness to get the better of their rivals whether of their own sect (as in this case) or of the opposite persuasion. The sectarian and factious quarrels which have grown round Vishnu temples for over a century past, and which have exposed temples and religion to public contempt and ridicule have no basis in the Agamas and Sastras. They are comparatively of recent origin. The peculiar situation of the foreign government and its Courts on the one hand, and fanaticism and vanity on the other, have afforded all facilities to them. It would be useful to obtain a detailed return, from Courts all over the Presidency from the High Court downwards, of the sectarian and factious suits and proceedings pending before them, giving also particulars of their nature, their period of pendency, their present stage and so on. The time and money wasted on such enterprises, are really stupendous!

A true reform of the Endowment Law must devise effective means for eradicating this evil to the very root. Special temple honours as such should go; and there should be no recognition of any rights for sects as such (barring, of course, the hereditary rights of individual service-holders). If the Congress Government could not accomplish this result no other kind of Government can do it! The Trustees should not be permitted to spend temple funds in litigations concerning sectarian disputes or disputes relating to honours—at any rate without a special order from the Court trying the case. This would provide the most effective check against such litigation.

MATHS.

Leaving aside certain specific endowments and temples which have come under the control of maths as *trustees,* the properties belonging to the math as such are neither *public* nor *endowments.* A perusal of the title deeds will show that they are invariably gifts by disciples to the heads of maths "to enable them to get on with their pujah, etc." Some of the matadhipathis have accumulated large property. This should not make any difference regarding their rights to it. Men with western education and thoughts are accustomed to compare matadhipathis with the Christian clergymen, who are, from the top-most of them, *employed* on salary to do certain services. The matadhipathis on the other hand is a *teacher* to whom the disciple resorts for learning and gives *guru dakshina* to show his gratitude for the *upadesam* he gets—never with a view to impress such gifts with

the incidents of trust! From these accumulations and savings, the matadhipathis have also purchased other properties. They are the *proprietors* of such property, and a long course of decisions (inclusive of those of the Privy Council) have confirmed this view.

The Committees appointed from time to time by government to draft endowment bills have considered carefully the question of the desirability of including *maths* within religious endowments, and the idea was finally abandoned by the Muthuswamy Iyer Committee. In any event, it was thought best to leave the welfare of each math in the hands of its votaries, and that it was not desirable to place them under the control of persons or bodies who may not show that deference to those spiritual teachers, which they may feel, is due to them. The Rajah of Panagal was therefore wrong in including *maths* within the Act. The recent Math Bill which was thrown out by the Legislative Council, went even to the ridiculous length of investing the Endowment Board, with powers to remove Swamiars and appoint interim Swamiars too!

The safest course would be to undertake Legislation, if at all, for individual maths, when there is real and large demand for the same from those having interest therein and in accordance with the peculiar conditions of such math and the desire of its head and its votaries. Maths should be excluded from the general Endowments Law.

THE TIRUPATHI DEVASTHANAM ACT.

The Endowment Board exercises under this Act, a nominal control over the Tirupathi Devasthanam; and for this it gets from the latter an annual contribution of Rs. 15,000 or so. The Tirupathi Commissioner draws the same salary as the President of the Endowment Board and starts on a higher pay than his. He is assisted by a Committee whose members are not inferior to those of the Board and who come from all over the Presidency and draw handsome travelling allowance and batta. While so, it looks anomalous that, in spite of the Tirupathi Act which is self-contained, that the Devasthanam should still be placed under the Endowment Board. The Commissioner of Police at Madras is not subordinate to the Inspector-General of Police; nor is the Presidency Postmaster, under the Postmaster-General of Madras!

Apart from this, the public naturally ask what advantage has the temple derived from the new regime for its working

there four years and over! The electric installation, the waterworks, the repairs to the steps leading up the hills, the Devasthanam office with its treasury arrangements, the spacious and convenient chatram near the Tirupathi Railway Station, and the other amenities to pilgrims, are all due to the Mahant who was managing the temple for about half a century.

The Tirupathi Act offered encouragement for the Koti Reddi Bill which provides for notification of temples and appointing executive officers to them.

The actual expenditure on the temples on the hill and the plains do not appear to exceed a lakh or a lakh and a half a year; let it be even two. But the annual income of the temple is between Rs. 12 to 15 lakhs! It is often contended that any surplus in government revenue must go towards reduction in the taxation burden. Will not the same reasoning apply to the Tirupathi Temple? Why should not the huge surpluses be utilised for the reduction of unconscionable fees levied on worshippers for the several *sevas* of the day? After all temples exist only for worshippers; and the *agamas* say that the puja therein is for them (*parartha*). While so, why are their natural rights to worship and witness the sevas penalised and obstructed? The *Tomala seva, e.g.,* is the main puja of the day which worshippers have a right to witness as in other temples freely; and Tirupathi levies about Rs. 14 for it. Pilgrims who take vows to put money into the Hundi utilise the sums for the *sevas;* but poor people who cannot command money go without them; and they are not even sheltered from the sun and rains while waiting for the *charity* seva, the entire front mantapam being occupied by the temple office! It is stated that the doles of food which the mahant used to give to indigent beggars, have been since stopped.

The affairs of Tirupathi also require thorough examination.

PROPOSALS SUMMARISED.

1. (*a*) Government itself may resume the superintendence of temples, as per S. 18 of the Hindu Religious Endowments Act through its Revenue Department.

(*b*) To keep Government in touch with the administration of temples an office like that of the Inspector of Municipalities and Panchayats or Registrar of Co-operative Societies may be organised with the necessary details.

Or

(*c*) The Endowment Board may be retained as a purely administrative body; in which event, it is not necessary to con-

centrate it at Madras. The Presidency may be divided into divisions and a Commissioner be placed in charge of that area and made responsible for the proper administration of the temples therein.

(*d*) Temple committees are not necessary, as they cannot function efficiently.

2. The provisions for the settlement of schemes for temples may be deleted, the Act itself providing for the periodical appointment of trustees and its manner, the maintenance of accounts and their audit, the preparation of budgets, the appointment of managers or treasurer and for doing other acts usually directed to be performed under schemes. Power may be given to the authorities concerned to retain such other features of schemes already settled (if they are found beneficial to the temples) as are not covered by the provisions of the Act.

3. Judicial functions now performed by the Board such as the *cy-pres* application of endowments or surplus (S. 67); sanctioning alienation of properties (S. 76), allocation of trusts of a mixed character to religious and non-religious purposes (S. 77), etc., may be restored back to Courts.

4. The distinction of 'excepted' and 'non-excepted' temples be abolished. But the rights of the hereditary trustees in the hitherto 'excepted' temples may be safeguarded like those of the hereditary trustees of non-excepted temples.

5. To temples having sufficient income (*e.g.,* having an annual income of Rs. 3,000 and more), paid trustees or managers may be appointed in the place of honorary trustees, from whom security may be taken and who will be subject to official discipline and rules of conduct.

In other cases honorary trustees may be appointed. A single responsible trustee to a temple proves to be more expedient in its interests; the more so, as the term of office of the trustee is now only five years. A larger number would be required only if party and sectarian interests are sought to be provided for. It is, however, necessary that a trustee or manager should be strictly enjoined not to involve the temple or its funds in sectarian or party quarrels. Quarrels between trustees are the cause of most trouble in temples.

6. 'Honours' and sectarian claims *as such* should be abolished. The rights, however, of individual hereditary service-holders only, to their accustomed honours as part of their remuneration, may remain. Barring this, there should be neither a

recognition of exclusive rights to any sect or individual for honours, general or special, nor a disability to worship or to recite the Vedas, Sanskrit or Tamil, as mere worshippers, so long as they are not prevented from doing so by reason of religion. Just as individuals entitled to worship in temples are not prevented from doing so on account of their caste marks, so the minor deities also attached to a temple should not have any disability for worshipping the main deity, by reason of its caste mark.

7. Maths should be totally excluded from the scope of the Act. Special legislation for any individual math may be undertaken if there is a sufficiently large and real demand from the interests concerned.

8. Temples should not be taxed for the superintendence of their administration. In any event, such tax should be a minimum on large incomes and none on smaller ones. Temples with the income of Rs. 300 and below for a year may be left out of the scope of the Act, as it is impossible to do anything for them from above.

9. The audit of the temple accounts may be performed by the audit department of the Government as in the case of Local Boards and Municipalities. There is no official check on the audit by private agency, except perhaps when an account goes to Court.

Conclusion.

The above brief outline of some of the features of the Endowment Act and its working, would make out a clear case for immediate reform. The most urgent thing to be done is the repealing of Chapter VI-A (Notified Temples) of the Endowments Act, and the restoration of the temple schemes which have become inoperative on account of "Notifications". Although Government has, for the time being, asked the Endowment Board to stop all notification proceedings, the legal method is only by way of an urgent legislation. This should be undertaken at once.

The Congress Government is expected to take up the matter of overhauling the Endowment Law in a spirit of sympathy and reverence, with due regard for the long-cherished sentiments and religious faith of the vast community of the Hindu people.

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SUMMARY OF ENGLISH CASES.

In re COUSEN'S WILL TRUSTS: WRIGHT *v.* KILLICK, (1937) 1 Ch. 381.

Will—Construction—Legacy to A—*In the event of* A's *death before testator to* B—*No further provision after* B—A *and* B *both predeceasing testator—Effect of—Lapses into testator's estate.*

The testator *C* who died in 1919, by his will dated 1907, bequeathed all the residue remaining after other bequests to his wife. After the death of his wife, half the residuary trust fund was to be held upon trust, "for all the children of my late uncle *S.M.C.* who shall be living at my decease in equal shares . . . provided always . . . that if any child of . . . . *S.M.C.* or of my late aunt *M.A.* shall have died in my lifetime whether before or after the date of this my will leaving issue living at my death, the share in the residuary trust funds which such child would have taken if he or she had survived me shall be held in trust for his or her personal representatives as part of his or her personal estate". Testator's wife died in 1930. No child of *S.M.C.* or *M.A.* was living at the death of the testator. *C.S.C.*, one child of *S.M.C.*, married one *A* and died in the lifetime of the testator, leaving a daughter *W* living at his death. *A* survived his wife and became her legal personal representative and was beneficially entitled to the whole of her residuary estate. *W* was the next-of-kin of *C.S.C.* at the date of the death of the testator and was entitled for her life to the income of the residuary estate of *A* under his will. *W* survived the testator. The question was if there was a lapse of the half share of the residue given by *C* to *S.M.C.'s* children.

Held, that by providing that if the person or persons who would have taken directly under the will (here Mrs. *A*.) predeceased him, the benefit which she would have taken is to go to her legal personal representative, as part of his or her personal estate, the testator has avoided the rule of lapse which says that on the legatee's death before the testator the legatee is not to take any benefit under the will but that it falls into residue. But the last words mean that it was a gift to Mrs. *A* or in the events which have happened, to the person who became entitled on Mrs. *A's* death to her estate, that was her husband *A*. But *A* did not survive the testator *C* and since there is nothing in *C's* will which provides against the lapse which must result if the person who is substituted for Mrs. *A* as legatee predeceases the testator, that portion of the estate of *C* has not been effectively disposed of and falls into the testator's estate.

In re CUTHBERT COOPER AND SONS, LIMITED, (1937) 1 Ch. 392.

Company—Private Company—Winding up—Transfer of shares—Transfer by death of shareholder—Director's power to

refuse registration of transfer—Refusal by to register deceased shareholder's executors—If ground for winding up—Companies Act, 1929, *S.* 168.

A ompany was registered as a private company, with a capital of £10,000 of 1*l.* shares each, of which one *CC* held 5,000 shares and his two sons 2,500 shares each. The first directors were *CC* and his two sons and continued to be so till 1930 when *CC* died. *CC* by his will appointed his three younger sons as executors and bequeathed his 5,000 shares to them. They applied to be registered as shareholders but the elder sons (directors) refused to register them as such. The younger sons were in the company's employment and they were dismissed from it also. The articles provided that "the directors in their absolute uncontrollable discretion may refuse to register any transfer of shares . . . without assigning any reason therefor . . ." and that the directors shall have the same power of refusing to register a transfer even by death, bankruptcy, etc., of a shareholder. The younger sons were refused even a copy of a balance sheet. The articles gave such executors of legal representatives only some limited rights, like receiving dividends and rights in a winding up to such a return as the deceased would have been entitled to. The younger sons therefore applied for a winding up order.

Held, that the principles which should guide the Court are those which influence the Court in determining whether or not a partnership shall be wound up. But the legal rights of the parties are to be determined by the articles, which is the bargain into which they have entered. Even treating these executors as contributories within the meaning of S. 168, Companies Act, 1929, as held in In re *Norwich Yarn Co.,* (1850) 12 Beav. 366, yet there were not sufficient grounds to order a winding up.

Brook's Wharf and Bull Wharf, Limited *v.* Goodman Brothers, (1937) 1 K.B. 534=106 L.J.K.B. 437.

Contract—Bailment—Firm of furriers—Import of goods from Russia—Goods stored in bonded warehouse of plaintiffs—Goods stolen there—No negligence on the part of warehouseman—Customs duties collected from warehouseman—Defendants, if liable to repay it.

The defendants, a firm of furriers, imported from Russia a consignment of squirrel skins. Some of those goods were stored in the plaintiff's bonded warehouse but while there, they were stolen. It was not proved that they were stolen by the negligence of the warehouse owners. The plaintiffs were compelled to pay the customs duties on the goods out of their own moneys as the defendants refused to pay for it. The plaintiffs thereupon claimed the sum that they so paid on the ground that it was a primary liability

of the defendants. The defendants counterclaimed for the value of the goods on the ground that they were stolen by reason of the negligence of the warehouseman. *Held,* that if the plaintiffs show that they took all reasonable and proper care of the goods, the mere fact that they were, notwithstanding, stolen is not sufficient any longer to make them liable for negligence. The duty of the plaintiffs cannot be put higher than that they must do what is reasonable. They are not insurers and as they had established that they took such precautions as reasonable and prudent care demanded, they were not liable on the counter-claim. As for their claim to duties:— The defendants clearly were, by the general law, liable as importers of the goods, to the payment of these duties. The duties are due on importation from the importer and remain due from the importer until the goods have been duly discharged from the custom's custody. The duties demanded of the warehouseman under Ss. 85 and 87 refer to the duties due from the importers. The plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was liable to pay ultimately, so that the latter obtains the benefit of the payment by the discharge of his liability. Under these circumstances the defendant becomes indebted to the plaintiff in the amount and is therefore liable.

SYMES AND JAYWICK ASSOCIATED PROPERTIES, LIMITED *v.* ESSEX RIVERS CATCHMENT BOARD, (1937) 1 K.B. 548=106 L.J. K.B. 279.

Easement—Sea wall—Wall to prevent the incursion of the sea into the land—Claim by owners of land on seaward side of the sea wall to drain on to the landside—If available.

Sea walls owe their origin to the prerogative of the Crown to protect the realm against the incursion of sea water, just as a wall of a port is erected to prevent the attack of an enemy. Nobody can therefore acquire any right to interfere with a sea wall so as to prevent it operating as intended by the Crown when it was built. Whether a gap is made in the sea wall or a hole is made under the sea wall with the object of letting sea water into the lands which lie behind the sea wall, those who make such a gap or hole are committing an illegal act; they can acquire no right to let sea water into the lands behind the sea wall, such a right being absolutely inconsistent with the object of the Crown in causing the sea wall to be built. It is impossible to assume that the Crown would grant any right to any one to interfere with the defences raised by the Crown against the incursion of the sea water.

The mere fact that by the action of the sea the land on the seaward side of the sea wall had become higher land than the land on the landward side of the wall could not possibly give them any right to drain their sea water through the wall.

REED *v.* CATTERMOLE (INSPECTOR OF TAXES), (1937) 1 K.B. 613=106 L.J.K.B. 407.

Income-tax—Minister of Methodist Church—Appointment of as minister of a circuit of 9 churches—Compulsory residence as a requirement of the office—Payment of rates on the house by employers—If occupant also liable under Sch. E to tax as on occupation.

The appellant was appointed a minister of a circuit consisting of 9 churches. The appointment required that he should go and live at a particular manse in order to more conveniently discharge his duties. Though it was too big for him, he was not allowed to sublet the manse nor to make any profit out of his occupation. The cost of repairs, furnishing, etc., are to be borne by the church. The Sch. A tax, the rates and water rate were defrayed by the church.

Held, that the minister is not liable to tax under Sch. E in respect of his occupation of the manse. The minister's possession and enjoyment of the premises are for the benefit of the church and his occupation is their occupation and therefore the church alone is properly assessable as occupier both for income-tax and for purposes of rating.

WYATT *v.* GUILDHALL INSURANCE COMPANY, LIMITED, (1937) 1 K.B. 653=106 L.J.K.B. 421.

Insurance—Motor insurance—Policy for user as for social domestic and pleasure purposes excluding hiring—Insured carrying persons for money on an isolated occasion—If risk covered by the policy—Injury to passenger on that occasion.

One *W* owned a motor car which was insured with the defendants under the terms of a policy and certificate of insurance. The material words of the policy were: "Description of use—Use for social domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in the schedule hereto, excluding use for hiring." The car was always used only for pleasure but on one day when himself on his way to London, he picked up two passengers, the plaintiff and another, for money. This was an isolated transaction. That day the motor car came into collision with a motor lorry, whereby the plaintiff sustained injury. The plaintiff recovered judgment against *W* for damages. *W* claimed to be entitled to indemnity from the defendant company in respect of the collision including the claim of the plaintiff. But the company denied liability on the ground that it was not covered by the policy.

Held, that the policy confines the indemnity to use for social domestic and pleasure purposes. The use of the car for driving

two persons to London for a consideration takes it out of "use for social domestic and pleasure purposes".

MILLENSTED *v.* GROSVENOR HOUSE (PARK LANE), LIMITED, (1937) 1 K.B. 717=106 L.J.K.B. 221.

Practice—Rules of Supreme Court, O. 22 r. 6—Court pronouncing orally judgment—Judgment not drawn up—Power to vary —Effect of O. 22, r. 6.

The plaintiff brought the suit for damages for injuries suffered by her on account of the negligence of a servant of the defendant company. Hilbery, J., tried it without a jury and by an oral judgment gave £50 as damages. The defendant's counsel wanted that costs should be awarded on the County Court scale but as the amount of damages was £50 it of necessity carried costs at the High Court scale. After the judgment, the defendant's counsel informed the judge that £20 had been paid into Court. The learned judge refused costs on High Court scale and directed costs only on County Court scale. The next day another application for argument on costs was made to the judge and on that he held that £50 was excessive and by a formal judgment gave only £35 with costs on County Court scale. It was admitted in argument that before O. 22, r. 6 of the Rules of Supreme Court the judge could have amended, inasmuch as by that time the order had not been drawn up and perfected.

O. 22, r. 6 provides:—

"Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into Court under the preceding rules of this Order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into Court and the amount of such payment."

It was contended that the effect of the rule is to disqualify the judge from acting upon his right to alter his judgment before it has been drawn up. The fact that the £20 had been paid into Court was not known to the judge.

Held, that the rule is directory and not compulsive. A judge in his discretion, when such a matter was mentioned to him or the jury, if he were of opinion that the statement as to payment in Court could not reasonably be calculated to cause any miscarriage, would be entitled, notwithstanding the mention to allow the case to proceed. Further the right view is that there is no effective judgment until it is drawn up and up to that time the judge is not

functus officio. Such a basic notion cannot be upset by the mere application of an inference derived from the inconvenience of applying it in the circumstances contemplated by a particular rule.

FARMER *v.* HYDE, (1937) 1 K.B. 728=106 L.J.K.B. 292.

Libel—Law of Libel Amendment Act, 1883, *S.* 3*—Report of proceedings in Court—How far privileged.*

During the hearing of a libel action the counsel for the plaintiff criticised the behaviour of a Mr. *D* very severely in his opening speech, and the plaintiff also in his evidence commented adversely upon Mr. *D's* behaviour. Thereupon Mr. *D* made an application to the Judge in these words "May I make an application? I am the rector of *S* and I want to contradict the many lies that have been told in this Court." This was reported to in the newspapers of the defendants. The plaintiff filed this suit against the proprietors of the newspapers for libel in that they reported this matter defamatory of him. It was admitted to be a fair and accurate report.

Held, that the application which Mr. *D* made to the Court was made in the course of the proceedings publicly heard before Court exercising judicial authority. The reports were fair and accurate reports of those proceedings, and consequently it was protected by S. 3 of the Law of Libel Amendment Act, 1883, which provides that "a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged."

KING *v.* BULL, (1937) 1 K.B. 810=106 L.J.K.B. 430.

Wireless Telegraphy Act, 1934, *S.* 1, *sub-S.* (3)*—Connecting a loud speaker to a central wireless receiver—If working a wireless apparatus.*

The respondent was a tenant and occupier of a self-contained flat being one of a block of similar flats owned by certain landlords. The landlords installed in the said block two wireless receiving sets for each of which they paid 10sh. licence fee. Each set was fitted with an amplifier connected by wires to a corresponding socket installed in each of the flats including that of the respondent. The respondent installed a loud speaker on his flat fitted with a wire and a plug and received broadcast programmes through it, but did not obtain a wireless licence. The operation and tuning of the two sets were under the control of the landlords, and they were switched off by them at 11 P.M. He was tried for having unlawfully worked apparatus of wireless telegraphy without a licence. It was contended that the loud speaker was not apparatus but was an instrument,

that the act of placing the plug into the socket did not constitute working of the loud speaker and that the tuning and switching constituted the working.

Held, that the respondent was in his own flat and without a licence seeking to have the advantage of the transmission of a wireless message from somewhere. He was doing what he did to work the wireless apparatus. He was therefore "working any apparatus for wireless telegraphy" and was guilty of that offence under S. 1, sub-S. (3) of the Wireless Telegraphy Act, 1934.

BYRNE *v.* DEANE, (1937) 1 K.B. 818=106 L.J.K.B. 538.

Defamation—Golf club—Automatic gambling machines therein—Report to police by a member—Removal by police of the machines—Notice put up on club wall, suggesting that some member had reported, etc.—Owners of club not removing the notice—Whether the words capable of a defamatory meaning—If owners liable for defamation by not taking down the notice from out of the wall.

One Mr. Byrne (the plaintiff) was a member of a golf club and the defendants Mr. *D* and his wife Mrs. *D* were the proprietors and sole directors of the club and the wife was also its secretary. Certain automatic gambling machines had been kept upon the club premises from 1932 for the use of the members. Some one gave information to the police about this machine which led to the police directing their removal and they were removed. The next day some one put up on the wall of the club a typed paper with the following verse written thereon:—

> "For many years upon this spot
> You heard the sound of a merry bell
> Those who were rash and those who were not
> Lost and made a spot of cash
> But he who gave the game away
> May he byrnn in hell and rue the day."

The word 'byrnn' was blacked out and the word 'burn' substituted for it in the original but in the carbon copy underneath it the word 'byrnn' remained. Rule 12 of the club's rules provided that no notice or placard, written or printed shall be posted in the club's premises without the consent of the secretary. The secretary admitted having seen the notice but stated that she did not remove it as she did not think it harmful but only thought that one member of the club was poking fun at another. The plaintiff brought the action for libel alleging that Mr. *D* and Mrs. *D* had published or caused to be published the words concerning him. Hilbery, J., held that the words were defamatory and that as the defendants had complete control of the walls and could have taken down the paper after they had seen it, the writing could only have been done with their approval and awarded nominal damages.

On appeal, *Held* by Slesser and Greene, L.JJ., that the words were not defamatory as there is nothing defamatory in saying that

one has reported certain acts, wrongful in law, to the police. The criterion is what a good and worthy subject of the King would think of some person of whom it had been said that he had put the law into motion against wrong doers.

Per Greene, L.J. The statement is a statement that the plaintiff who gave the game away was guilty of disloyalty to his fellow members of the club. Whether it was justified or not is quite another matter. The two proprietors of this establishment by allowing the defamatory statement to rest upon the wall and not to remove it, with the knowledge that they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.

WHITE OTHERWISE BENNETT *v.* WHITE, (1937) P. 111=106 L.J.P. 49.

Marriage—Nullity—Bigamy—A form of marriage celebrated in a foreign country—Husband then having a wife living—Wife domiciled resident in England—Husband foreign domicile—Notice served on husband—Non-appearance of—Court, if has jurisdiction to decree nullity.

The petitioner *B* went through a ceremony of marriage with *W* at Melbourne, Victoria in 1926. In 1908 the respondent *W* had been married to one *F* at Malta and the marriage was still subsisting. The marriage of the petitioner *B* and respondent *W* had not been consummated. *B* was domiciled and resident in England, while *W* was domiciled and resident in Australia or Malta. *B* filed the petition for a declaration that the marriage was null and void. Notice was served on *W* who merely signed acceptance of service and a formal statement that he was a married man but did not appear.

Held, that in England in cases where a dissolution of marriage is sought the domicile of the husband is the cardinal and controlling fact, and that the Court having jurisdiction in the country of that domicile has sole jurisdiction over the claim for dissolution of the marriage. This has been applied when nullity was sought for on the ground that the respondent was incapable of consummating it. In this case the petitioner never acquired the domicile of the respondent, either in law or in fact, but is domiciled and resident here. The respondent has never resided here. It is not, in those circumstances necessary for *B* to proceed to whatever part of the world the respondent may happen to reside in, in order to get her status established by a decree of nullity. Though the respondent has by his conduct and admission so acted as to justify the Court in exercising jurisdiction, there was no conflict of law between different jurisdictions, because the ceremony was bigamous, and therefore by the law of every Christian community there was never any matrimonial status common to the petitioner and the respondent.

JOTTINGS AND CUTTINGS.

The Portrait of T. Rangachari, Dewan Bahadur.

The Hon. Sir M. Venkatasubba Rao, *Kt.*, in unveiling the Portrait of Dewan Bahadur T. Rangachariar in the Advocates' Association Hall on 27th August last, said:—

The portraits that adorn these walls are a striking testimony to the fidelity and devotion of the members of the Advocates' Association to those, who in their day, climbed the heights of the legal profession. To-day, another portrait is going to be added and that will serve to keep bright the fame of a distinguished lawyer. Mr. Rangachari was one of a galaxy of illustrious lawyers, who are among the proudest memories of the Association. His matchless eloquence, his capacity to capture the mind and hold the attention, are in my opinion, the distinguishing traits which gave Mr. Rangachari the commanding position that he achieved. Of him, it might be said, that he possessed a silver tongue, which gained him the admiration of the Bar and the respect of the Bench.

Some of his eminent contemporaries have passed to silence, and every life, it is the law of nature, must have its close; but over Mr. Rangachari, though alive, a silence has already fallen, and it is most distressing and sad to think, that from the lips of the man, whose glory was his eloquence, comes no word. He was stricken by a malady some five years ago, from which he has not yet recovered. May the homage we have met here to pay him this evening soothe in some measure his hours of pain and suffering, is my ardent wish, as I am sure, is the wish of all of you assembled here.

There are many here who, I doubt not, can claim greater intimacy with Mr. Rangachari than myself; but of his achievement at the Bar I feel I can speak with some authority. His active forensic life covered a period of about twelve years of my judgeship. He had an amazing power of mastering the facts of his case and presenting them with accuracy and lucidity. He spoke with unrivalled knowledge of every detail and brought to bear on his task a thoroughness which was rarely surpassed. He went on from argument to argument, explaining, illustrating and expatiating and never did he weary the Judge. In a voice that was captivating he addressed the Court, but there was a masculine strength which made his argument irresistible. At times he struck blow after blow with wonderful vigour till he smashed his opponent's case. There was, when occasion demanded it, a moral fervour as it were, in the speeches which he made. I remember a second appeal which I heard sitting with Mr. Justice Ramesam, involving intricate questions of water rights. For understanding the facts about half a dozen maps had to be referred to and closely studied, but Mr. Rangachari had an amazing grasp of every detail and with his bewitching eloquence he made even that extremely dry case interesting. He has set an ideal

which, I believe, may with advantage be followed both by the junior and the senior sections of the Bar. In the first place, he was very thorough; his preparation left nothing to be desired. He was not impatient of drudgery. These qualities enabled him to be exact in statement and lucid in exposition. In addition to these, he possessed the natural gift of eloquence. In marshalling the facts he was not only lucid but logical, so that to listen to him was a pleasure. He had another great quality, the power of selection so necessary to powerful and convincing advocacy. It is a common failing at the Bar to stress what is non-essential and slide over what is essential. This mistake Mr. Rangachari would never commit, but would go straight to the heart of the question that mattered. Even at the height of his glory, he read his briefs thoroughly, unlike many a leader who rests on his laurels. No man ought to remain at the Bar, or for the matter of that on the Bench, after the work has ceased to interest him. In the case of Mr. Rangachari, I do not think any junior that engaged him had ever reason to complain that he shirked his work. Indeed from the point of view of the Judges, he was a most painstaking and thorough Advocate, who did his work conscientiously and argued his cases with zeal and energy. He was always self-possessed and was most genial and affable. He was forceful and vigorous, but always respectful. Eloquence, as Lord Morley says somewhere, is more than words; speech is not eloquence, eloquence is character, conviction, sincerity, purpose, service and fitness. Mr. Rangachari's eloquence was of this type and it is no wonder that when to this was added his intellectual acumen, his advocacy became irresistible.

On his achievements in the sphere of public work I shall not dwell, as they are not matters of which I can speak from personal knowledge. But there can be no doubt that he threw himself into his work, whatever its nature was, with great energy, and discharged his public duties faithfully and efficiently. His career has been a distinguished one and of the many eminent men that the profession has produced, he is undoubtedly one of the greatest.

I deem it both a privilege and an honour to have been asked to participate in this function and I unveil his portrait with great pleasure.

Lord Blanesburgh's Retirement.—There have been interesting and important judicial changes in the past week, due to the retirement of Lord Blanesburgh through illhealth. Lord Wright, who succeeded the late Lord Hanworth as Master of the Rolls in October, 1935, now returns to the House of Lords as a Lord of Appeal in the place of Lord Blanesburgh. Lord Justice Greene becomes Master of the Rolls, and Mr. Justice Mackinnon leaves the King's Bench Division for the Court of Appeal. Lord Blanesburgh's retirement will be much regretted, especially on account of its cause. It

closes a very distinguished career at the Bar, on the Bench, and in the House of Lords and Judicial Committee. He is still remembered as a forceful and able advocate both at the Junior Bar and after he had taken silk. He did useful work as a Judge of the Chancery Division, and both in the Court of Appeal and in the House of Lords he delivered many judgments marked by great learning and cogent reasoning. But outside his judicial work he rendered important service during and after the war with a view to ameliorating the conditions which the war produced. In 1918 he was Chairman of the Government Committee on the Treatment by the Enemy of British Prisoners of War, and in the Report published in March of that year, and signed by him on behalf of the Committee, it was recorded that, on the evidence, the Committee failed to find a trace even of lip service to the obligations solemnly undertaken by the German Government in time of peace for regulating their conduct in time of war. Subsequently Lord Blanesburgh gave his help in mitigating the hardships caused to Germans here and abroad by the handing over of their property to the Public Trustee.—*L.J.*, 1937, *p.* 297.

The New Master of the Rolls.—The return of Lord Wright to the House of Lords gives Lord Blanesburgh a distinguished successor. We need not speak of the work he has done in the Court of Appeal as Master of the Rolls. That, it turns out, has been only an interlude in his work in the final Tribunal to which he was first appointed direct from the King's Bench Division in 1932. It will be remembered that he was a member of Lord Hanworth's business of Courts Committee, and in a Memorandum appended to the Second Interim Report of the Committee he suggested a more thorough scheme of Circuit reform than the Committee had recommended. Since then further progress has been stopped by the Report of the King's Bench Commission. The appointment of Sir Wilfred Greene as Master of the Rolls follows quickly upon his appointment as a Lord Justice straight from the Bar in October, 1935. It brings back that office, after a lengthened severance, to its rightful sphere of Equity, and bestows it on a very distinguished equity lawyer. Sir Wilfrid's greatest work outside the Bar was his Chairmanship of the Companies Committee. Upon their Report the Companies Act, 1929, was based. He also in little over a month performed, in concert with Mr. Justice Clauson and Lord Plender, the formidable task of fixing at 66,450,000*l.* the "global" value of the coal royalties, but the task seems to have been facilitated by the total royalty income being agreed, leaving only the number of years' purchase to be fixed, namely, at 15 years. The appointment of Mr. Justice MacKinnon as a Lord Justice is a fitting sequel to the work he has done as a Judge of the King's Bench Division; it brings into the Court of Appeal a commercial lawyer, trained by long association with the

late Lord Justice Scrutton; and shows, as Lord Hewart again reminds us, that Law and Literature are not to be divorced. But who is the "perhaps first-rate poet" who, Lord Hewart said in his St. George's Day speech last week, has died in the last 80 years? And who is the first-rate Judge, without a "perhaps"?—*L.J.*, 1937, *p.* 297.

Burma Judicial Changes.—A practising barrister, Mr. R. T. Sharpe, has been appointed to fill the vacancy in the Rangoon High Court caused by the promotion of Mr. Justice A. H. L. Leach to be Chief Justice of the High Court of Madras, a promotion which, it is officially announced, will take effect as from July, 2.

The new C. J. and the new Puisne were practising members of the Bar before their elevation to the Bench. It is 30 years since Alfred Henry Lionel Leach was called by Gray's Inn. His appointment as Judge of the High Court of Rangoon was on February 15, 1933.

Mr. Reginald Taafe is of the South-Eastern Circuit, his chambers at 1, King's Bench Walk. He also is a Gray's Inn man, called, post-war, in the same term, almost exactly 17 years ago.—*L.J.*, 1937, *p.* 314.

Mr. Jayakar's Appointment.—Mr. Mukund Ramrao Jayakar's appointment as one of the Judges of the Federal Court is described by an Indian legal correspondent as a "pleasant surprise to many in India". From which it would appear that while he was not included by the prophets in their list of "probables", it is recognised that the appointment is a good one and that Mr. Jayakar's selection for this very exalted judicial post is in accordance with his merits.

"In India", my correspondent writes, "Mr. Jayakar is known as a scholar, a courageous social reformer and a nationalist politician, who for over two decades served his country well . . . . Now that he is called upon to serve India in a different and distinguished capacity, he may be relied upon to acquit himself therein with credit and dignity". Fifty-seven years of age, he has had a successful career at the Bar, but to the public he is known chiefly for his political attainments. He was leader of the Swarajya Party in the Bombay Legislative Council till 1925 and represented Bombay City in the Delhi Assembly between 1926 and 1930. In 1930 he was leader of the opposition at the Legislative Assembly. Later he was delegate to the Indian Round Table Conference and Federal Structure Committee, and member of the Indian delegation co-operating with the Joint Parliamentary Committee on the India White Paper. —*L.J.*, 1937, *p.* 314.

Commission and Omission.—The misadventures of a beautiful film star, even in the arid realms of contract, cannot fail in feature value. Thus Miss Frances Day, appearing in *Rowson* v. *Alexander,* inspired du Parcq, J., to creative endeavour in the law of agency, and caused staid readers of *The Times* (May 1) to wonder why the theatrical and cinematic news had been transferred to the law report page. In the law relating to commission this case is of the first importance. The actress had promised the agents (who secured her a contract) to pay to them as commission a percentage on salary paid to her. When she (admittedly wrongfully) broke her contract with her employers the agents automatically lost their percentage, and claimed that Miss Day had broken an implied warranty not to prevent the agents from earning their commission. The learned Judge was at a loss whether to treat the actress as the vendor of a house refusing to complete, so as to apply *Trollope* v. *Martyn,* (1934, 2 K.B. 436), or as the owner of a business refusing to sell goods to customers introduced by a traveller. The former, of course, would be liable if his refusal were justified; the latter not liable, even if his refusal were wrongful. The learned Judge found that the only analogue to Miss Day's promise to the agent was a charter party, and held that by her wrongful prevention of the agent from earning his commission she had made herself liable in damages for breach of warranty. If the question how a breach of contract can be a wrong to a third person was, for the purposes of this action, successfully begged, the fault, dear Brutus, was not in our Stars.—*L.J.*, 1937, *p.* 317.

Baron Martin and Royal Birthdays.—It was in or about the year 1902 that Mr. Herman Merivale published a book called *Bar, Stage and Platform,* in which appeared many excellent anecdotes and some jests concerning judges and lawyers of the past. He made a mistake, however, in a reference to Baron Martin, describing him erroneously as a "famous Yorkshire racing judge", and his accent as "broad Yorkshire". The learned Baron, as a well-informed reviewer observed, "was the son of Samuel Martin of Newtownlimavaddy—immortalised by Thackeray—in the County Londonderry. There he was born in the year 1801, and thence, in due course, he proceeded to Trinity College, Dublin. It was only after he had gone into voluntary exile that he became acquainted with the moors and cities of Yorkshire; and he would have resented bitterly, and with justice, the charge that he ever lost the purity of his North Irish accent."

That he was a sporting judge was true; and, like the first Lord Russell of Killowen, Lord Brampton, and other judges of more modern times, he was a member of the Jockey Club. Unlike the others, Baron Martin won with his racehorses certain substantial trophies, which are still treasured by his descendants. It is

said of him that when the date of an important racing fixture was approaching it was his habit to consult an almanac. When he found, as he did not infrequently, that the birth of a member of the Royal family had occurred on the day in question, "he would suggest to the Bar that, as a mark of respect, the Court should adjourn. And to this proposal a loyal and patriotic assent was invariably accorded."—*L.J.*, 1937, *p.* 331.

An Aid to Hearing.—Deafness has rarely, and then only with great reluctance, been regarded by any judge as an adequate reason for his voluntary retirement; even when by reason of his unacknowledged infirmity, all his judgments are delivered in cases which are only part heard.

Baron Martin was one those who suffered from defective hearing; and when he had been a judge for a quarter of a century his deafness drove him into retirement. "Though the time had nearly come," says a biographer, "for the close of his judicial life, the Bar was sorry to lose him, and there was a great gathering of counsel at his public leave-taking in January, 1874. It was during the valedictory address of Sir Henry James A.G., that it became apparent to all beholders that a miracle had somehow been accomplished. 'Sam' Martin, his deafness notwithstanding, was obviously following the remarks of the Attorney-General with attention and interest. And that he had heard every word was placed beyond doubt when, in his reply he duly acknowledged each several compliment which Sir Henry had paid him. To the few only was it known that the tactful law officer had taken the precaution of presenting to the retiring judge a written copy of the speech which he proposed to make." It was the Baron who, on the Western circuit, once spoke of a member of the Junior Bar who afterwards became Lord Coleridge, C.J., in terms which Mr. Coleridge regarded as a reflection on his professional conduct and said so in language of exquisite precision and purity. The Baron hastened to explain that he had been completely misunderstood and to assure "the accomplished scholar, the graceful man of letters . . . . . . " that he had always regarded him as "a most respectable young man".—*L.J.*, 1937, *p.* 331.

Precedents and Pleadings.—"Pleadings therefore," observes Lord Atkin in a significant preface to Volume I of the new *Encyclopaedia of Court Forms and Precedents in Civil Proceedings* [Butterworth & Co (Publishers), Ltd.], "pleadings therefore still test the competent lawyer: and while precedents seem an almost necessary guide to the less experienced, they are often a valuable aid to the old hand both as a means of checking his own draft and an occasional clue to a fault in his opponent's". Indeed, the pleader (it seems) is in like case with the poet: as the

late John Drinkwater remarked, varying the adage with caustic truth, *poeta nascitur et fit.* If he be a poet, a man must be born to poetry, yet without continuous discipline he shall not come into his inheritance. The consummate pleader is he who, at the first, has so modelled himself upon the precedents of his masters in the law, placing the first clause first, and the last clause last, and marking the peculiar rhythm and the latent precision in the meaning of words that after many years of severe self-training he has at the last won for himself the mastery of his material and can rejoice in his facile ability to produce a pleading which he can justly regard as a legal work of art. Until that day, he must put his trust in precedents; to which, thereafter, he still will turn as to a touchstone to test the merit of his own.—*L.J.*, 1937, p. 354.

Royal Marriage Law.—Not without interest, also, are Mr. Mathew's references in the same chapter to the legal difficulties and rights of a Prince of Wales who would marry the woman of his choice. How King Edward VIII, by reason of his proposed marriage, ceased to reign is now a matter of unforgettable but recent history. Had the marriage difficulty occurred when he was Prince, what would have been the position? Mr. Mathew describes the provisions of the law as "singular enough".

"No Prince of Wales, being a descendant of King George II, says the 12 Geo. III, c. 11, is to be capable of contracting matrimony without the previous consent of the sovereign signified under the Great Seal and declared in council; and every marriage celebrated without such consent first had and obtained is to be null and void. So far so good. But a proviso adds that should such a descendant, being 25 years of age, persist in his resolution to marry against the wishes of the Sovereign, he may give 12 months' notice to the Privy Council and thereafter lead the lady of his choice to the altar. Such a marriage is to be good, 'as if this Act had never been made', unless within the 12 months both Houses of Parliament have expressed their joint and several disapprobation of the union. Parliament, therefore, has arrogated to itself the right to adjudicate between the Sovereign and heir-apparent in the event of dissension between them on this most delicate topic."—*L.J.*, 1937, *p.* 367.

The Marriage Bill.—The Marriage Bill for which the Government have granted facilities is now printed in the form in which it left Standing Committee A. The purpose of the Bill as stated by the promoters is "to strengthen the institution of marriage, and it starts well by forbidding divorce within five years of the date of the marriage. Accordig to the Bill as introduced, no decree was to be granted till the five years had elapsed. As amended clause 1 provides that no petition shall be presented till after that period. The grounds for divorce are enlarged, but not quite to the extent

proposed by the Bill. They include desertion for at least three years, and also cruelty and incurable unsoundness of mind; but the two extensions to habitual drunkenness and to imprisonment under a commuted death sentence have been struck out. It is difficult to see how matrimony in any real sense can exist where one of the spouses is an habitual drunkard. The clause in the Bill which defined the defences to proceedings for divorce by substituting a new section 178 in the Judicature Act, 1925, has been redrafted and is now a clause defining the duty of the Court on presentation of a petition for divorce; it has to inquire, so far as it reasonably can, into the facts alleged and into the questions of connivance, condonation and collusion. Practically, with the extension of jurisdiction to assizes, such inquiries become increasingly difficult.—*L.J.*, 1937, *p.* 372.

The Law of Contract.—We have already referred shortly to the Sixth Interim Report of the Law Revision Committee with its revolutionary recommendations as to the Statute of Frauds and the doctrine of Consideration. The Report quotes conflicting opinions as to the merits of the Statute, which was stated to be passed "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury". But according to a judicial view in which Lord Mansfield concurred, the Statute, if it had been carried out according to the letter, "would have done ten times more mischief than it has done good, by protecting, rather than by preventing frauds". And so it was not carried out to the letter, but to impart into it judicial qualifications required a great mass of legislation. So far as the statute related to contracts for the sale of land, it was tempered by the doctrine of part-performance, and the statutory provision and the qualifying doctrine have been transferred to the Law of Property Act, 1925. In that safe harbour the Report appears to leave them undisturbed, but we are likely to see a ruthless overhauling of the other provisions of section 4 of the Statute upon which the law of Contract has been largely based. To this no objection need be taken, but the proposed change in the doctrine of Consideration is a more serious matter. Many of the Members of the Committee, the Report says, would like to see "the doctrine abolished root and branch," but it is recognised that such a proposal would "almost certainly arouse suspicion and hostility and the Committee only recommend that the doctrine should be pruned of most of its mischievous features." It should be possible to do this without destroying a distinctive feature of the English Law of Contract.—*L.J.*, 1937, *p.* 372.

Reprisals.—Germany's act of reprisal after the still unexplained attack on the battleship *Deutschland* by Spanish Government aero-

planes, with its heavy list of killed and injured, has been very generally regretted. Admittedly the provocation was extreme, and though the incident is not comparable with the ruthless ferocity of the destruction of Guernica and the massacre of the civil population—which is reported to have been the work of German aeroplanes—yet it strongly emphasises the necessity of restraint in the use of modern and terrible modes of warfare. Any reference to such occurrences should not omit to recognise that the Government forces have been, also according to reports, guilty of similar excesses, notably in the destruction of Oviedo. Under the circumstances it is unfortunate that the German Government have resorted to the uncertain and objectionable practice of reprisals. Reprisals, even in war, can only be justified, if at all, on the ground of necessity, and in any case it is repugnant to both justice and humanity to involve at random the innocent in the punishment of the guilty. But as between the German and Spanish Governments the German act of reprisal was done during a time of peace, and though reprisals during peace have been resorted to for the purpose of bringing pressure on an offending State, they do not usually proceed beyond seizure of property and embargo on ships. It may be correct in logic for them to be proportioned to the offence, but to carry logic to the extent of taking life is entirely without justification. No doubt every effort will be made—we trust with success—to prevent the recurrence of such an incident.—*L.J.*, 1937, *p.* 387.

Vale atque Ave.—Time is making its mark on the constitution of the High Court. We noticed last week the retirement of Mr. Justice Horridge after 27 years' service on the Bench. This has been followed by the retirement of Mr. Justice Talbot, and one of the vacancies has been filled by the appointment of Mr. Frederick J. Wrottesley, K.C. Before his appointment to a judgeship in 1923, Mr. Justice Talbot had a great reputation as an ecclesiastical lawyer, and he was also counsel to the University of Oxford. Happily ecclesiastical litigation has now practically left the Courts; such matters are better dealt with elsewhere. But if there has been little opportunity in his own special sphere, Mr. Jusice Talbot has, in the general work of the High Court, well maintained by his judgments the high standard of the Judiciary, and his resignation after a comparatively short tenure of office is to be regretted. In the Privy Council, of which, like Sir Sidney Rowlatt, he becomes a member, he may still find opportunity for judicial work. Mr. Wrottesley, who now joins the Common Law Bench, took silk in 1926, and since 1930 has been Recorder of Wolverhampton. He brings to the judicial position the reputation of being a sound lawyer, and may be expected to be a very capable and useful judge.

—*L.J.*, 1937, *p.* 387.

Sir John Simon.—The change in Ministerial offices which is most interesting to lawyers is the transfer of Sir John Simon from the Home Office to the Chancellorship of the Exchequer. It is 22 years since Sir John, who, with Rufus Isaacs, F. E. Smith and Duke, was in the front rank of advocacy, refused the Lord Chancellorship in order, as was understood, to remain in politics as Home Secretary and the higher office went to Lord Buckmaster to be held however, by him for little more than a year. Sir John Simon's tenure of office was on that occasion also short, and he resigned on the question of Conscription. In 1916, when, after the Dublin rising and Mr. Birrell's resignation, Mr. Asquith went to Dublin, he wrote to Mrs. Asquith: "I am in despair for a Chief Secretary. If only Simon were available." But Sir John was spared that experience, and his career lay outside Ministerial office till he became Foreign Secretary in 1931. Meanwhile, he rendered signal service to the country by his speeches in 1926 during the General Strike. One in the House of Commons on May 6, with its apt quotation,

> "O! it is excellent
> To have a giant's strength, but it is tyrannous
> To use it like a giant,"

struck home and was a leading factor in bringing the Strike to a close. And as Chairman of the Indian Statutory Commission (1928-30), he paved the way by the Report for the new India Constitution, and happily went outside the scope of the Commission's reference to propose the inclusion of the Princes in a Federal India. Sir John Simon's second tenure of the Home Office has been marked by sympathetic efforts at humanising the contact of police administration with the people, and the Exchequer will furnish him with a new opportunity of employing his great and versatile ability. But there should still be possibility of his doing public service in a higher and more influential position.—*L.J.*, 1937, *p.* 387.

Divorce Reform.—We now have the latest edition (Bill 117—printed June 1) of the Marriage Bill as it left the Commons. No one knows, of course, what amendments, if any, the Lords will insert in it and how far the sponsors of the Bill will yield. We may assume without much fear of disappointment that the Bill will become law this year and will be known as "Herbert's Act"—as it should be. It is timed to come into operation at the beginning of next year, so that those who practise in the Divorce Court will have the Long Vacation in which to master its details. We think there will be general approval for the new law that peope who get married cannot be heard to petition for divorce for five years. The scandalous state of affairs in which reckless people (sometimes, but not always, young) rush into matrimony will possibly be remedied by this change, and it secures time for possible forgiveness and

reform of which philosophers, churchmen and lawyers alike approve. Other changes to be made are too numerous to mention; but the long unhappiness of one spouse tied to another who is hopelessly insane, persistently cruel or persistently neglectful will at length, and not too soon, find a remedy. We hope next week to publish an article setting out shortly the present state of the Bill before it goes for consideration by the Lords.—*L.J.*, 1937, *p.* 388.

The "Leader of the Opposition".—The discussion on Thursday of last week in the House of Commons on the third Reading of the Ministers of the Crown Bill raised a number of interesting questions. There was what Sir Stafford Cripps called the perennial problem of the anomalous position of the Law Officers with regard to salary; there was the relinquishment of private practice by professional men who become Ministers of the Crown; and there was the proposal for the payment of a salary to a person who is now to receive legislative recognition as the "Leader of the Opposition". As to the first question, it is always a matter of surprise to a person unaccustomed to the traditions and practice of the Bar that a Law Officer should receive payment for his services far in advance of any other member of the Government. It is not that he has to work hard—"to spurn delights and live laborious days"—and nights. Other people have to do that. Nor is it that their work has greatly increased of recent years. The increase became marked in Lord Alverstone's day, and led to Lord Salisbury requiring in 1895, that private practice should be given up. Sir Richard Webster accepted the Attorney-Generalship on these terms, but Sir Edward Clarke declined to join him as Solicitor-General. Since then there has been no idea of going back to the old custom, and with the continued growth of calls from Government Departments for the advice of the Law Officers, it would be impossible for them to combine private practice with public duties.—*L.J.*, 1937, *p.* 403.

Law Officers' Brief Fees.—The special difficulty in regard to the emoluments of the Law Officers lies in the fees for court work. Assistance to the Government and Government Departments, and to Parliament, in the shape of advice, and the oversight of the drafting of Bills, might well be covered by a fixed annual sum, and such sums the Law Officers receive. And at the time when private practice was given up, as we have said, in 1895, the Government proposed that contentious work should be covered by a further fixed sum of 3,000*l.* But to this Lord Alverstone strenuously objected, and his objections were voiced again in the House of Commons last week. There are occasions when Government work requires the employment of special counsel, but economically minded officials would not incur this extra expense if the Law Officers were always available

at a flat rate. And although, according to old tradition, the Crown is too proud either to pay or receive costs, the tradition has faded away, and in taxing costs the Taxing Master has nothing to go on if the Law Officer's brief is not marked. "The Government", wrote Lord Alverstone, "recovers in the course of a year a considerable amount in costs from litigants who would not unnaturally object to being charged a fictitious brief fee". This is a practical difficulty which can, perhaps, be got over, and it would be an advantage if the question of the Law Officers' emoluments could be settled on a satisfactory basis so as to avoid the appearance of their being overpaid as compared with other members of the Government. Sir Stafford Cripps, in a useful contribution to the debate, urged that the functions of the Law Officers should be reviewed, and an inclusive salary fixed for all the work required to be done for Parliament or the Government. And he appears to have successfully got rid of the practice for the Law Officer to appear in cases of murder by poisoning. That is work for the ordinary Criminal Bar.—*L.J.*, 1937, *p.* 403.

What is a Charity?—The law, said Lord Coke, is "perfection of reason". This gratifying statement was reflected in *Goggs* v. *Bernard,* which settled the principles of the Law of Bailment: "Nothing is law that is not reason". A fortiori, this should be so when we come to the Law of Charities, for the law so favours charities that it will not let a charitable gift fail. But at the outset there is the question what is a charity, and if a gift cannot pass the test, the law cares nothing for it and the money goes to the next of kin. But the law has left the test of charity extremely vague, and that is hardly a mark of the perfection of reason. It is laid down in one case that a gift for the good of a particular parish is a valid charitable gift (*A. G.* v. *Lonsdale,* 1 Sim. 105). But change the wording a little, and let the gift be to the vicar of the parish for distribution among such parochial institutions or purposes as he shall select, and the gift is not charitable. The parish may have had an ecclesiastical object once, but with the passing of time the objects of the parish have widened; these are no longer exclusively religious, and the gift just stated failed (*Re Stratton,* (1931) 1 Ch. 197; 100 L.J. Ch. 62). In *Re Ashton's Estate* (Times, 5th inst.), Luxmore, J., faced by this authority, held that gifts to the vicars and churchwardens of two parishes "for parish work" were also not necessarily confined to religious purposes and were void. But whether this was a correct following of previous decisions or not, it is obvious that if such a gift does not pass the test of being charitable, neither can the Law of Charities pass Lord Coke's test of being "perfection of reason".—*L.J.*, 1937, *p.* 404.

Consulting a Solicitor.—The large number of home-made wills and the much larger number of home-made contracts bear additional testimony to a pointed observation made in the Sixth Interim Report of the Law Revision Committee (Cmd. 5449). They recommend (inter alia) that S. 11 of the Married Women's Property Act, 1882, should be extended to all life, endowment and education policies in which a particular beneficiary is named (p. 30; par. 49). It is true, they say, that the same result can be achieved by creating an express trust, on the part of anyone who knows the law. "But as it is not the practice of the average man", they sagely continue, "to consult his solicitor before taking out an insurance policy, we feel that it is desirable to make a statutory provision on the subject". The justice of the observation will not be gainsaid. How often does "the average man"—his legal prototype "the reasonable man" will be easily recognised—how often does he fail to consult his solicitor until the horse has escaped? With a little forethought, the stable door might have been bolted in time and a luckless litigant saved his costs. For in the end to his solicitor he needs must come; why not at the first? Think of the small estates that, through the testator omitting these precautions, from time to time become depleted; or of the diputes upon a commercial contract loosely drawn in the vague language of "the average man". The art of draftsmanship has gone out of fashion, to the detriment not so much of the lawyer, as of "the average man" himself.—*L.J.*, 1937, *p.* 405.

Veterans in the Law.—Although Viscount Craigmyle, who celebrated his eighty-seventh birthday this week, is no longer in active service as a Lord of Appeal in Ordinary, it may be said of him, as was said of one of old, that his eye is not dim nor his natural force abated. To the reports he made many notable contributions; his vigorous dissenting judgment in the stress of war time in *Rex* v. *Halliday*, [1917] A.C. 260, on the question of the validity of a statutory regulation giving power to imprison a naturalised alien as a person of hostile origin and associations, is still remembered for its vigour and cogency of reasoning, and has been preferred by many constitutional lawyers to the decision of the majority. His quondum colleague in the House, Viscount Dunedin, is senior by a year, and of him, too, it can be said that even at this advanced age his occasional letters in *The Times* show that the virility of his thought and powers of expression have suffered no diminution by the lapse of years. But it would seem that among those in the highest ranks of the judiciary longevity is a notable characteristic. Lord Eldon was eighty-seven, but in this matter he was easily out-distanced by Lord Halsbury, who attained ninety-eight. When, in 1900, Lord Morris, as a Lord of Appeal, retired, and found that he was to be succeeded by Sir

Nathaniel Lindley, he quietly observed that "a worn-out old man of seventy-three had been succeeded by a lad of seventy-two!" In such fashion do these Lords of Appeal retain their juvenility of spirit.—*S.J.*, 1937, *p.* 425.

Solicitors in the Cabinet.—In the new Cabinet formed by Mr. Neville Chamberlain the solicitor branch of the profession is well represented by two distinguished members—Sir Kingsley Wood, who retains his former office as Minister of Health, in which he has done yeoman service, and Dr. Leslie Burgin, who was included in the Coronation honours as the recipient of a Privy Councillorship in recognition of the excellence of his work in the post of Parliamentary Secretary to the Board of Trade, and who now succeeds Mr. Hore Belisha as Minister of Transport, an office of continually growing importance in which he will find abundant scope for his energies and tactical skill. Time was, and that not so very long ago, when the appointment of a solicitor as a member of the Government, even outside the Cabinet, would have occasioned some surprise as being not in accordance with the conventions in such matters; but this former attitude received its quietus when Mr. H. W. Fowler (afterwards Lord Wolverhampton) was invited by Mr. Gladstone to undertake the duties of President of the Local Government Board with a seat in the Cabinet, an office in which he certainly showed marked ability and constructive power. In more recent years not a few solicitor members of the profession have served in the Cabinet, where their practical knowledge of affairs proved of great value, and one of them, Mr. Lloyd George, achieved the distinction of being the first to attain to the highest office in the Government.—*S.J.*, 1937, *p.* 445.

The Prime Minister's Official Status.—The new Premier, Mr. Chamberlain, comes to an office which, though long the most important in the realm, had not till quite recent years acquired any legally defined status. Walpole, who, for many years wielded immense power as head of the Government, was, we are told, unwilling to be called "Prime Minister", because in the popular mind of his time that term signified not a leader chosen by the people, but a favourite of the Court, and so, when charged with being "sole Minister" or "prime vizier", he declared with some emphasis that he was only one of the King's Council and had no more voice in affairs than any other member of the Cabinet. Later developments gave, however, to the chief Minister a preponderating influence, and the title became generally used. Lord Beaconsfield described himself as "Prime Minister of England" in the Treaty of Berlin; but it was not till 1905 that the holder of the office acquired, as such, an official status. In that year King Edward VII by a royal warrant, which, after reciting that "the precedence of our Prime Minister

has not been declared and defined by due authority", proceeded to declare "Our Royal Will and Pleasure that in all times hereafter the Prime Minister of Us, Our Heirs and Successors shall have place and precedence next after the Archbishop of York". The first statutory use of the title is in the Chequers Estate Act, 1917. It is of interest to recall that the new Prime Minister in his former capacity as Chancellor of the Exchequer, had a link with the law in that, for the last few years he presided in the Lord Chief Justice's Court on the morrow of St. Martin at the ceremony of the nomination of the sheriffs. In earlier days this was not, as it now is, the only link which the Chancellor of the Exchequer had with the Courts, for it fell to him, even when a layman, to preside in the Court of Exchequer when the Barons were equally divided. On one occasion Walpole, when Chancellor of the Exchequer, had to spend three days in this duty and gave the casting vote in the decision.—*S.J.*, 1937, *p.* 445.

Solicitors' Undertaking and Personal Liability.—The attention of readers may be drawn to an opinion recently expressed by the Council of The Law Society on a point frequently arising in practice and to the course which the Council proposes to take in the matter. The question relates to the extent to which a solicitor incurs personal liability when giving an undertaking on behalf of a client. In the May issue of *The Law Society's Gazette* it is stated to be common knowledge that in order to facilitate completion of a sale or purchase a solicitor will give an undertaking, which nearly always the solicitor on the other side, knowing nothing of the client, would not accept, unless he thought he was getting an undertaking from the solicitor himself. In such cases the Council has expressed the opinion that the use of words such as "on behalf of my client" or "on behalf of the vendor" does not make the intention sufficiently clear, and it is considered that further or different words are necessary if the solicitor does not intend to accept personal liability. "Accordingly", it is said, "where, on the completion of a sale or purchase of property, a solicitor gives an undertaking 'on behalf' of his client without any further qualification, then in the Council's view, the solicitor should himself implement it, and if he fails to do so the Council will bring pressure to bear upon him to compel him to give effect to the undertaking as a matter of professional etiquette". The Council also adverts to the obvious desirability of it being made clear in the undertaking itself whether or not the solicitor is intending to accept personal liability. We desire to express our indebtedness to our contemporary for the opportunity afforded by the note referred to of bringing the matter to the notice of our readers.—*S.J.*, 1937, *p.* 446.

A Loss to Tradition.—The resignation of Mr. Justice Horridge now that Avory, J., is at rest and Eve, J., liberated from law to follow rural fancies, leaves the High Court deprived of the familiar feeling of an almost patriarchal tradition. Far distant now seems the year when Thomas Horridge and Horace Avory, elevated to the Bench within a day of each other, inspired the rhyme in celebration of the event:—

"'Well brother, well', said Mr. Justice Avory,
'We're judges now; I've gained extensive knowledge
Of crime and criminals', 'And so of knavery
You'll be the scourge' said Mr. Justice Horridge."

Both belonged to a tradition of quiet judicial efficiency which did not lend itself to satisfying the journalistic avidity for anecdotes, but each displayed on occasion the flair for the apt word. Thus, once before Horridge, J., there came an action brought by Sam Mayo, the comedian, against a colleague who was alleged to have borrowed one of his songs. He recited it in the witness-box, each verse ending with the words "I've only come down for the day". Before it had gone very far, however, a settlement was reached, and the judge remarked: "He will now be able to add another verse with regard to this Court—that he only came down for the day".—*S.J.*, 1937, *p.* 456.

BOOK REVIEWS.

POSSESSION OF IMMOVABLE PROPERTY by Sidhangshusekhar Chakravarti, Advocate, Patna High Court, Gaya, with a Foreword by P. R. Das, Esq., Barrister-at-Law, 1937. Price Rs. 5. Published by The Book Company, Ltd., College Square, Calcutta.

In this book the learned author has dealt with the subject of possession in law in all aspects and its consequences. It is thus not a commentary on any enactment and the author had to collect from different sources his material for the book on a difficult subject. In the first chapter, he deals with the general principles relating to possession and in later chapters in relation to co-ownership, landlord and tenant and mortgages. Then he treats of adverse possession and trusts and religious endowments and lastly in relation to future estates and interests. Thus it will be observed that the entire ground in the subject has been covered; the case-law has been noticed clearly bringing out the principles illustrated by them. We have every hope that the merits of the book will be appreciated by lawyers and judges.

HAND BOOK OF HINDU LAW by M. D. Manek, B.A., LL.M., Fourth edition, 1937. Price Rs. 3-8-0. Ramakrishna Brothers, Law Publishers, Poona.

This Hand Book of Hindu Law sets out clearly the principles of Hindu Law. Its popularity can be judged from the fact that

four editions of the book have been called for in a comparatively short period of time. The book is mainly intended for students preparing for the law examinations and it satisfies their requirements exceedingly well. It is not without its use to lawyers who will find it helpful to them. It is of interest to note that the latest enactment relating to the Hindu women's rights to property has been given in the book and also commented on. We are hopeful that the book will continue to enjoy the popularity of the previous editions.

The LAW AND PROCEDURE OF EXECUTION by Kumud Nath Bhaumik, B.L., 1937. Published by The Eastern Law House, 15, College Street, Calcutta.

The subject of execution of decrees and orders is a sufficiently complicated one to deserve a separate text book on it. It is a matter for satisfaction that Mr. Bhaumik who is familiar to us as a writer on legal subjects has brought out a comprehensive book on the law relating to it. The cases on the subject are numerous and sometimes conflicting. There are also the all-India and local amendments to the Civil Procedure Code on the subject, as also Civil Rules and Orders bearing on execution. This book which gives all the information on the subject noticing the cases in their appropriate places will be found to be of use to the members of the bench and the bar.

TRIAL BY JURY AND MISDIRECTION by Sir Manmatha Nath Mukerji, *Kt.*, M.A., B.L., 1937. Price Rs. 10. Published by The Eastern Law House, Calcutta.

It is a matter of gratification that Sir Manmatha Nath Mukerji should have found it possible to write a treatise on the subject of trial by jury and misdirection. His great experience as a prominent lawyer on the criminal side of the bar and his ripe wisdom on the bench invest the book with unique interest. The book has been divided into four parts, the first part dealing with the history of the system of trial by Jury in England and India and the later parts with trials before the High Court and Courts of Session, misdirection and appeals, reviews and references. In a book of this description, it is needless to add that all the relevant cases and the principles laid down by them have been noticed in their appropriate places. We have no doubt that the excellence of the book will be widely appreciated and it will be largely used by the bench and the bar with profit.

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OUR COLLECTIVE RESPONSIBILITIES.*

Even on a festive occasion like this when we have gathered to have a little relaxation and to cultivate social contacts between different members or groups of members of the Bar, it is not inappropriate and is in fact in accordance with our tradition if we devote a little time to think about some of our common problems. I have therefore taken the liberty of addressing you on some of our collective responsibilities which to my mind require the urgent and serious attention of the Bar through its various organisations. Two matters that I propose to deal with arise out of the working of our judicial system in relation to the large bulk of our litigants and the third though an internal problem of the Bar concerns its efficiency and is therefore a matter of public importance.

As regards the first two problems the point of view that I desire to stress is that of the large bulk of our litigants who are very poor and often helpless. It seems to me that the time has arrived when this point of view would be particularly insistent and demand greater attention and indeed satisfaction than it has received in the past. The removal of any serious abuses or hardships which the poor litigant can reasonably complain of in our legal institutions is likely to engage the immediate attention of the Government, the Judiciary and the Bar. The extension of the franchise by the addition of nearly five million voters in this province has naturally resulted in the transfer of political power to a large section of people consisting of the lower middle and poorer classes whose representatives occupy seats in the Assembly which till now consisted mostly of members drawn from the richer and upper middle

* Paper read by Mr. S. Ramaswamy Iyer, Advocate, Madras, at the Advocates' gathering held on 8th August at Woodlands, Royapettah, Madras.

classes. The representatives of classes of our population which supply most of the litigants for our Courts are therefore likely to exhibit great impatience with features in our legal system which unduly disregard their interests and would naturally refuse to wait for reforms till lawyers and judges drawn from the more well-to-do classes find time and inclination to attend to them. Even in England it has been till recent years a reproach against lawyers and judges that they have allowed grave abuses in the legal system to continue if indeed they had not blocked reform. The eighteenth century and the first quarter of the nineteenth were periods of stagnancy and the first powerful drive for legal reform began just about the time of a great democratic advance made by the Reform Act of 1832. During the thirty years from 1830 to 1860 many conspicuous improvements in law were effected and it is a curious coincidence that another great extension of the franchise made by the Reform Act of 1867 synchronised with a move for the long overdue reform of the Judicatures which finally resulted in the passing of the famous Judicature Acts in 1873. It must however be mentioned that whatever was the case in the past the Bar and the Bench in England have been very active in the cause of law reform during the last few years. The appointment in 1934 of a Law Revision Committee by Lord Sankey, then Lord Chancellor, has led to legislation removing several age-long defects and anomalies in the realm of substantive law and to a continual examination of several other defects in different branches of the law. Besides there have been other Committees like the Business of the Courts Committee whose reports have led to changes in procedure. In the United States also the last decade and a half has been a period of great legal activity. The American Law Institute which is an entirely non-official association of lawyers, judges and professors has been carrying out an ambitious and arduous programme of issuing Restatements of the law in several branches. Besides its members have been engaged in the study of various problems of judicial procedure from the point of view of ameliorating the lot of litigants and witnesses and making justice effective and cheap. Here in India our problems are peculiar and different but are perhaps more urgent and insistent for a solution. The Bar has now therefore a great opportunity as well as a responsibility in helping to bring about

a proper solution but it is essential to bear in mind that the Bar has to make certain re-adjustments in its general outlook in response to present conditions and pay due heed to its own place in the social polity and its obligations for social service and not merely to its rights and emoluments. This method of approach to our problems will make great demands on us for impartiality, disinterestedness, and self-examination and unless those demands are fairly met it seems to me that the influence and position of the Bar and indeed even its existence may be in jeopardy in the future. Let us remember that great social experiments are in progress elsewhere which do not have any place for a professional Bar in their scheme of administering justice.

The first question concerns the allied subjects of excessive cost and delay. I shall here confine my remarks to civil litigation as the second problem to be noticed below will have a special application to litigants in Criminal Courts. Before this audience it is not necessary to take up time in arguing for the urgent need for reduction of court-fees. Especially in money claims the scale of fees is prohibitive and in fact outrageous in view of the high purchasing power of the rupee in terms of goods and especially agricultural produce. The result has been as recently reported by the Collectors of several districts that stamp revenue has fallen and litigants give up resort to the Civil Courts. As our villages are rarely free from factions and our people are often illiterate and easily misled, we cannot assume that avoidance of litigation necessarily indicates a fair adjustment of disputes outside Court and that a good many just claims are not abandoned. It seems to me that our Bar Associations and the Bar Council have to take up this matter with the authorities and press upon them the urgent need for a revision of court-fees. Besides this item of expense there are many others which make civil litigation far too costly and risky for the average litigant and I would suggest that some of our mofussil Bar Associations should undertake in some selected areas an enquiry as to the actual cost incurred by parties in different types of civil litigation, the factors that contribute to the cost and any other facts bearing on this question. An enquiry of this kind may also be useful by way of disclosing other abuses in our judicial system. As regards the expense in the appellate Courts, there are two

items which call for comment. First, it appears unfair to call on a party to pay the same court-fee as in a suit or any court-fee at all for every appeal that he has to prefer. Thus if a plaintiff sues for recovery of a sum of Rs. 1,000, he pays a court-fee of Rs. 112 and odd in the suit. If he fails, he has to pay a like amount for an appeal in the District Court and again a like amount for a second appeal in the High Court. In these three Courts, he pays nearly a third and if he has to go up on a L.P. Appeal he pays altogether nearly half the amount sued for. If he succeeds finally his success may often be illusory and may not enable him to recover his expenses from the other side who may be too poor or too troublesome and may evade payment. In our procedure a second appeal is practically on leave of a Judge of the High Court who admits it after a careful examination of the material papers and almost always after hearing arguments. There is no justice in calling upon an appellant to pay a court-fee in a case where he has already paid it in one or both the lower Courts and is obliged to appeal from a judgment which in the opinion of a Judge of the High Court is *prima facie* erroneous in law. Similar considerations apply to court-fees in L. P. Appeals. The second item of expense which calls for revision is printing. The rule, which requires every appellant in the District Courts to file printed copies of the judgment or order appealed against, was made long ago but as type-writing has since become quite efficient and cheap there seems to be no reason for putting parties to the heavy expense of printing. The Courts may themselves issue type-written copies of judgments in plain foolscap with lines numbered for the use of the appellate Courts and charge moderately for such copies. The same course may, it seems to me, be adopted without any great inconvenience or disadvantage in the case of second appeals. An appellant in a second appeal has now to buy six printed copies of judgments of both Courts. If he has been also appellant in the District Court he would have already paid for the printing of the first Court's judgment but he has to do it over again. If he buys these printed copies and takes them to his Madras lawyer who may tell him, as is not unoften the case, that there is no appealable point of law, he has paid for all this printing in vain and the spectacle of the poor ryot who is fighting for a piece of land and has perhaps not even the bare necessaries of life going back disappointed

with only his bundle of printed copies left to him is not unusual and cannot fail to rouse sympathy. Besides, it is high time that printing of pleadings and documents is dispensed with for the smaller type of work in the High Court including second appeals and miscellaneous cases. The parties may be required to file the necessary papers in a clean and well-typed form. The case of first appeals is different as the stakes are larger and the High Court has to decide on the facts. Even in such cases some of the High Courts seem to require only typed papers. I suggest that our Association should ask for a modification of the rules about printing and press on the High Court the need for generally scaling down the cost of appeals. Though the heavy cost of suits and appeals is also a matter of complaint in England the problem is of a very different type in this country, where even the highest Courts of appeal are concerned with a large proportion of small and petty work and the bigger type of litigation which comes up in a rich and industrial country is practically absent. The only other matter under this head is delay. Excessive delay is as ruinous to the litigant as excessive cost and the position in our High Court seems to call for early attention. At present the position is that parties in a first appeal have to wait for about seven years and those in a second appeal four years for their cases to be heard. In many cases parties do not survive to get a decision for which they had incurred great expense and trouble. In many others their financial condition is hopelessly altered for the worse and they are unable to conduct their cases. Even cases of first appeals being struck off for non-prosecution are now-a-days by no means rare and behind common place legal incidents like 'counsel reporting no instructions' or 'an appeal abating' may lurk silent tragedies by way of families having been ruined by delay in obtaining their legal rights or dues or their members having famished and died owing to such reasons. The state of affairs is nothing short of a grave public evil and it is surprising that the authorities have allowed matters to drift to this condition. If I may speak with all humility on a subject of some delicacy and difficulty, the only remedy appears to be to appoint as many judges as would be required to clear the arrears in the course of six months or a year and to leave the work in a condition in which an appeal will normally be heard under 12 months and a second appeal under six. This was the period of pend-

ency of such cases several years ago and no reason or consideration ought to stand in the way of affording this essential relief to our litigants As the maximum strength of this High Court has been fixed at 16 by an Order in Council, a fresh Order in Council would have to be sought as a temporary measure on account of the grave state of emergency prevailing in the highest Court in this province. The real difficulty has been the question of cost but I would like to make the suggestion that prominent men in the Bar should in view of the great interests involved be invited to do the work in an honorary capacity for a short period of six to twelve months. In England retired judges are often requested to render such service and men of great age like the late Justices Avory and Darling have responded to the call of public duty. Besides on occasions when owing to illness or other emergencies there is a dearth of judges to do the work on circuit, it is the practice to employ King's Counsel in London or in the circuit itself as *ad hoc* Commissioners of Assize to clear the lists of pending cases. The report of the Royal Commission on the Despatch of Business at Common Law states that this practice is by no means unusual though it involves inconvenience and hardship to the King's Counsel selected. I refuse to believe that our Bar will not respond to the call of duty if an invitation is extended to it. In the course of twelve months the work of the High Court can be reduced to normal proportions and the permanent strength can then be adjusted to the size of such work. I have ventured to make these suggestions as the state of the work in the High Court is a matter of common talk in the legal world and all the strenuous efforts made by our judges so far to cope with the work have failed for no fault of theirs. I am aware that remedies which look simple to persons outside the seats of authority may not strike those inside in the same light, but it would be interesting to know whether any other course can be suggested short of allowing matters to drift as they have done, I would respectfully request the Bar Council and our Association to consider this matter seriously.

The second problem is one of considerable importance to the fair name of the judicial system of which the Bar is an integral part. I think the time has come when the Bar itself has to undertake an examination of the extent to which our Courts and their procedure lend themselves to abuse and the

prevalence of undesirable litigation. One cannot help feeling that there is a great deal of scope and facility at the present day for false claims, charges and defences in our Civil and Criminal Courts. The administration of criminal justice and the investigation of crime are also not infrequently attended with oppression in various forms and by various agencies. It is not for instance an uncommon event for a petty quarrel in a village being magnified by local partisans and a big and wasting criminal case resulting from it. An event of this kind often brings devastation and ruin to many families while it fills the pockets of a few others in the village and outside. It is accompanied by one or more of many evils such as victimization, blackmail, suborned evidence,—evils which are said to have been rampant in mediæval England. But we must recognise that our economic and social polity is still in many parts mediæval. In many of our villages there are numbers of wholly or partially unemployed and idle people who find it profitable to promote quarrels. The existence of caste groups which on account of their exclusiveness imperfectly react to the needs of one another and the prevalence of factions are also contributory factors. But these explanations will not go the whole way and the part played by the component elements of our judicial system, namely, the Bar, the Magistracy, the Jury and the Police in allowing such abuses to exist requires careful and impartial examination. I would respectfully suggest that the Bar Council may invite some Mofussil Bar Associations to undertake with the co-operation of local judicial officers an enquiry into (*a*) cases where the evils of the kind abovementioned come to their notice; (*b*) the actual cost incurred by parties in some typical cases in the criminal Courts. The enquiry is likely to be difficult as the veil of secrecy may be hard to lift in respect of many of such matters. But lawyers with local knowledge and experience may be able to overcome the difficulty if they proceed in a spirit of earnest inquiry. In this matter we have the fine example of the Harvard Law School which has been conducting an investigation of this kind. One of the reports issued on a survey of crime and criminal justice in Boston discusses several defects in the administration and makes suggestions for making justice more swift, sure and cheap. Some of the suggestions cover a wide field such as imposing restrictions on

admission to the Bar, control by Courts over lawyers' fees, improvement of the quality of juries, etc.

The third and last subject I would like to briefly notice relates to certain matters which would ensure the continued efficiency of our Bar. The first of them is the assumption by our Bar Council of its statutory power to impart and control legal education and examination. As the Bar Council has already decided to do so and to ask for the sanction of the High Court, I need not take up your time by speaking about the need for its doing so. The assumption of this important responsibility and satisfactory discharge of it by the representatives of our Bar acting in co-operation with the Bench will not merely ensure the efficiency of the entrants to our profession,—which is a very vital matter—but also enhance the prestige and reputation of the Bar in our province. There are two outstanding advantages in the proposal of the Bar Council. First it can coach up students in a number of essential subjects not now taught to them by spreading the course of studies over three years including the year of apprenticeship. Secondly it has ample material in our Bar for a large and able teaching and examining staff and the opportunity so provided to them of working under the direction of senior members of the Bar and members of the Bench will be of the greatest service to them and to the Bar as a whole. But our efficiency depends on other factors as well. In our Bar it was preserved by a noble tradition of leaders encouraging forensic talent in younger men and enabling them to make their mark in the profession. In fact there have been eminent men who would go out of their way to find out or discover talent from outside their own immediate circle of relations or juniors. In that way a succession of able lawyers who ultimately occupied the topranks was ensured. It seems to me that this tradition needs preservation in the highest interests of our Bar both in the City and in Mofussil centres. As in recent years the Bar has had a great accession of strength from different communities, assistance in the above form to deserving men also of other communities than one's own will promote brotherly feeling and communal harmony in the Bar and indeed also outside it. Gentlemen, I have done and I hope and trust that our Bar would safeguard its internal position as well as secure and justify its rightful place in our social structure.

SUMMARY OF ENGLISH CASES.

DROWN *v.* GAUMONT-BRITISH PICTURE CORPORATION, LIMITED, (1937) 1 Ch. 402.

Company—Shares—Sale of at premium—Reserve fund partly made up of the premium on the shares—Dividend if can be paid therefrom.

From time to time during the company's history shares were issued at a premium and the premium was from time to time carried to reserve. There existed a balance carried to reserve of £5,00,000. Part of it was made up of these premiums. In respect of the financial year ending March 31, 1937, the company proposed to pay a dividend which could not be paid without utilising a part of this reserve. A shareholder, on behalf of all the other shareholders also, moved the Court for an injunction restraining the company from paying it from so much of the reserve as represented the premiums, contending that it was capital and not profits of the company.

Held, that subject to anything in the articles of association to the contrary, there is nothing legally wrong in a company dividing among its shareholders a premium obtained on the issue of shares. The premium from its very nature is not part of the capital paid up on the shares; it is the surplus of the sum received in respect of the share over the amount required to pay up the share to the extent to which it is treated by the company as paid up. Therefore the principle that capital paid up on the share must not be divided is in no way infringed by distributing the premium in dividend.

In re WATERHOUSE'S POLICY, (1937) 1 Ch. 415.

Stamp Act, 1891, *S.* 88—*Insurance policy—Mortgage of—Mortgage stamped on £500—Claim under policy more than £500—Security debt also more than £500—Mortgagee claiming to be paid £500—If insurance company liable to pay—Failure by company to pay on demand on a* bona fide *mistake—Payment into Court—If company liable to pay interest.*

In May, 1926, Mr. S. H. W. deposited with a bank a life insurance policy effected on his life with the Law Life Assurance Society, which society was subsequently in 1910 taken over by P. Assurance Company. This was deposited by way of an equitable mortgage to secure moneys then due and thereafter to become due with the Bank. By a mortgage dated 1928 W. assigned the policy to the Bank to secure the balance that may be owing by him from time to time to the Bank on current or any other account. Notice of this was given to the P. Co. The amount then due to the Bank was £596 and odd. The deed was stamped with a stamp sufficient

to cover £500, the face value of the policy. On 13th August, 1936, the policy became payable and with bonuses, etc., it amounted to £963. The sum payable to the Bank on that date was £619 and odd. On 4th August the Bank sent to the P. Company the policy and the mortgage deed. The company refused to pay the amount unless the mortgage was impressed with an additional stamp. The bank insisted that £500 may be paid to it and the balance to Mr. S. H. W.

Held, that the effect of sub-S. (2) of S. 88 of the Stamp Act, 1891, is this, namely, that "where the total amount is unlimited, as for instance in this case where the Bank permits one of its clients to overdraw his account and there is no fixed limit placed upon the amount allowed in overdraft, or where there is a security for a limited sum, and an overdraft is allowed beyond that sum, there is no necessity to stamp the security for any amount greater than the amount for which the Bank rely upon it as security for the loan. Therefore the P. Company was bound to have paid the £500 claimed by the Bank.

The company took *bona fide* a different view of the construction of the Act and was not prepared to run the risk of paying the money over and therefore paid the money into Court.

Held, that the company was yet liable to pay interest from 13th August, 1936, down to the date of payment into Court.

THE KING *v.* SALFORD ASSESSMENT COMMITTEE: *Ex parte* OGDEN, (1937) 2 K.B. 1.

Rating—Rating and Valuation Act, 1925—Assessment committee—Hearing objections to draft valuation lists of the rating authority—Judicial act—An officer of rating authority appointed as clerk to the assessment committee and to be present at its meetings—Objection to rating authorities' order—Hearing of—If clerk can be present at the meeting—Objection on ground of bias—Valid.

A Mr. *B* was employed by the council of the city of *S* for 34 years past and had been engaged in the administrative section of the town clerk's department. In addition to other work, he had, from January, 1935, also acted as clerk to the assessment committee for the assessment area of *S* city and in that capacity had advised the committee of the proper procedure and made the proper entries in the valuation lits of the amendments ordered by the committee, but took no part in the committee's decisions. As part of that duty of committee clerk he attended the meetings of the rating committee, to which were delegated the council's duties with respect to preparation of valuation lists for taking the minutes of their proceedings. Beyond that he took no part in advising them. Mr. *O* was the owner and co-occupier of cinemas and a billiard hall. A draft valuation list of the rating area of *S* was made by the rating

committee. Mr. *O* filed objections thereto. The matter came before the assessment committee. A resolution of the committee provided that "pending the appointment of a clerk to the committee Mr. *B* of the town clerk's department be appointed as acting clerk to the committee" and that he "remain in attendance upon the committee during the whole of the meeting". Pursuant to that Mr. *B* was at the meeting and Mr. *O* objected to his presence there and took out the application for a writ of prohibition prohibiting the committee from acting on those resolutions, as Mr. *B* was so related to the *S* rating authority, which was the party appearing against Mr. *O* on his application to amend the valuation list, as to be unfit to occupy the position of acting clerk of the committee, and that Mr. *B* may have a bias which may affect the committee's deliberations.

Held, that the assessment committee constituted under S. 17 of the Rating and Valuation Act, 1925, to hear objections made to the draft valuation list under S. 27 and finally to approve the list under S. 28 of the same Act, is a body performing judicial or *quasi*-judicial functions. Therefore the general principles affecting the possibility of bias, as exemplified in the case of justices of the peace, should be applied to an assessment committee, and that irrespective of their particular constitution. It is not only necessary that justice should be done, but that it should manifestly appear that justice is done. Mr. *O* might reasonably suppose that justice would not be done by the assessment committee when the adviser to the committee might of necessity be acquainted with the preparation for the proceedings of his opponents, the rating committee. A rule was therefore issued prohibiting the assessment committee of the city of *S* from allowing Mr. *B* to remain in attendance on the committee during the hearing of Mr. *O's* objections and proposals and during the subsequent deliberations thereof.

GREAT WESTERN RAILWAY COMPANY *v.* CHAMBER OF SHIPPING OF THE UNITED KINGDOM, (1937) 2 K. B. 30.

Railway—Railways Act, 1921, *S.* 37, *sub-Ss.* 1 *and* 2—*Application by railway company for consent of the Railway Rates Tribunal to reduce rates—Considerations to weigh with the tribunal.*

In April 1936, the G. W. Railway applied to the Railway Rates Tribunal for its consent to the granting of some concession rates, which are more than 40 per cent. below the standard rates, for the carriage of grain between certain places. The chamber of shipping objected to the grant of sanction on the ground that this traffic between the two places has hitherto been carried on by coastal carriers and that the grant of this sanction would affect members of the chamber of shipping whose vessels are employed in the coasting trade.

Held, that on an application by a railway company under S. 37 of the Railways Act to the Railway Rates Tribunal for sanction to the grant of exceptional rates, the Tribunal is not bound to consider whether the exceptional rate will prejudice coastal carriers, in the sense of placing them under a disadvantage. The tribunal is only to consider whether the exceptional rate would jeopardise the company's interests and the purposes mentioned in S. 58 of the Act, namely, (1) to obtain realisation of what in the Act is called the standard revenue and (2) to ensure that persons using or desiring to use the railways shall not be prejudiced.

MERSTHAM MANOR, LIMITED *v.* COULSDON AND PURLEY URBAN DISTRICT COUNCIL, (1937) 2 K.B. 77.

Dedication—Highway—Rights of Way Act, 1932, *S.* 1—*"Actually enjoyed by the public as of right and without interruption for a full period of* 20 *years"—Meaning of.*

Section 1 of the Rights of Way Act, 1932, provides as follows: "(1) where a way not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way. (2) Where any such way has been enjoyed as aforesaid for a full period of 40 years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way".

A roadway which joined two highways ran across the plaintiff's estate and the plaintiff claiming it as his private property, blocked the road by erecting a fence at one end and a gateway at the other. The defendant (District Council) removed them claiming the road as a highway acquired by prescription under S. 1 of the Rights of Way Act, 1932.

Held, that the words "actually enjoyed by the public as of right" mean that he who asserts the right must establish as a matter of fact, on the one hand, the actual enjoyment of the right by the public as of right and, on the other hand, the actual suffering of the exercise of that right by the landowner for the full period of 20 years. "Enjoyed" means "having had the amenity or advantage of using". "As of right" requires that the quality of the acts, as well as the acts, must be established. The words will be satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given. "Without

interruption" means actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment.

LEVER BROTHERS, LIMITED *v.* KNEALE AND BAGNALL, (1937) 2 K.B. 87.

Appeal—Libel action—Injunction order—Disobedience of—Committal for contempt by Judge in Chambers—Appeal to appellate Court or Divisional Court—R.S.C., O. 54, r. 23.

In an action for damages for libel and for an injunction restraining the defendants from further publishing the libels, Branson, J., decreed the suit and further granted an injunction. Finlay, J., in Chambers passed an order committing the defendant for contempt in disobeying the order of Branson, J. O. 54, r. 23 of the Rules of the Supreme Court provides that "In the King's Bench Division, except in matters of practice and procedure, the appeal from a Judge at Chambers shall be to a Divisional Court".

Held, by the Court of Appeal, that this was a matter of practice and procedure within the meaning of O. 54, r. 23 and the appeal lay to the Court of Appeal.

THE KING *v.* MANCHESTER JUSTICES: *Ex parte* LEVER, (1937) 2 K.B. 96.

Summary Jurisdiction Act, 1879, *S.* 22*—Justices—Trial for motor offence—Accused absent—Accused fined—Order not entered in the register of convictions—Information of previous convictions—Warrant to accused to appear—Trial by another Bench—Severer fine by the new Bench—If valid.*

On 20—1—1937 two summonses came before justices sitting at *M* police court charging *L* with having left a motor car without lights and unattended in a street. When the summonses were called on, the applicant was not present, though he had been served with the summons. The police let in evidence on the charge and *L* was convicted and fined 20*s.* on one and 10*s.* on the other count. Before an entry had been made in the register of convictions and orders of the Court kept under S. 22 of the Summary Jurisdiction Act, 1879, it was brought to the notice of the justices that *L* had three previous convictions for motor offences. In view of that information the justices felt that the matter should be dealt with in the presence of *L* and therefore issued a warrant for his arrest. *L* appeared but it came before a differently constituted Bench on 23—1—1937, and there he pleaded guilty. That Bench fined him 40*s.* on each count.

Held, that *L* was entitled to plead *autrefois convict* by the decision of the justices on 20—1—1937 and that the later conviction

should be quashed. After the justices on 20—1—1937 had ordered the applicant to pay certain fines, all that remained to be done in connection with their decision was for it to be formally entered in the register of convictions. It is not the entry in the register which makes or contributes to the making of the conviction. Conviction has already been made, and complete and therefore the later conviction is not sustainable. *Rex* v. *Sheridan,* (1937) 1 K.B. 223, followed.

MEDCALF AND ANOTHER *v.* STRAWBRIDGE, LIMITED, (1937) 2 K.B. 102.

Nuisance—Private road—Resolution by local authority to take over the road—Vehicle being run down the road with a skid pan on the wheel—Damage to the road—Frontagers in the road—If can maintain an action for injunction without adding the Attorney-General—Interest apart from the Public.

The two plaintiffs were two frontagers living in Cedar Avenue, a private road. Under a document, one *T* acquired a building estate. The document imposed on him certain obligations with regard to making and maintaining roads. *T* made it out into plots and sold them to different purchasers in 1920. There was entered between him and the various purchasers a deed of mutual covenant whereby each purchaser agreed to perform the stipulations in the deed, one of which was to pay the vendor *T* a reasonable proportion of the cost of maintenance of the roads. Plaintiff *M* had acquired his house from *T*. The other plaintiff *K* purchased it from another *L* but it was also subject to the restrictive covenant of *T's* deed so far as it ran with the land. In 1927 and 1930 *M* and *K* both contributed to repairs of this Avenue. In 1936, *M* and *K* objected to a horse van of the defendant being driven down the road with a skid pan on the wheel by the defendant's servant, as it tore up the surface and damaged the road. When it was not heeded to, *M* and *K* brought an action to restrain the defendant from using the road like that. In July, 1936, the local authority passed a resolution with regard to taking over of this private road. There were objections filed to the apportionment of the cost and nothing had yet been done definitely. The Attorney-General was not made a party.

Held, that so far as *K* was concerned, she did not take directly from *T* but from *L* subject to covenants running with the land, and that these covenants were not running with the land. But *M* was a direct purchaser from *T* and was bound by the covenant and therefore under a contractual obligation to bear some share of the cost of maintaining the road. But whatever that may be, both the plaintiffs were entitled to maintain this suit, because as owners of houses or premises on a private road they had a special interest in preventing damage to the road because of the possible effect on the

enjoyment and value of the houses. Further by the road being damaged, there was the danger of the council taking it over and making it at the owner's expense. These fears gave them sufficient interest differing from that of the other members of the public. A *quia timet* action can be brought in cases of nuisance if the plaintiff shows that he will sustain substantial damage by what the defendant is about to do. Here this is an illegal act, illegal in the sense that the defendant was inflicting a wholly unnecessary damage to the land and the Court would interfere in anticipation.

HOPE AND ANOTHER *v.* GREAT WESTERN RAILWAY COMPANY, (1937) 2 K.B. 130.

Practice—Suit for damages in the King's Bench Division—Judge ordering trial by Jury—If plaintiff can object—Rules of the Supreme Court, O. 36, rr. 1 to 7—Effect of.

An infant girl brought an action in the King's Bench Division against the Railway Company for damages for injuries sustained by her by the alleged negligence of the company's servants. The Master made an order that the action be tried by a Judge and special jury at the defendant's instance. The Judge in Chambers dismissed an appeal against that order of the Master. She appealed to the Court of Appeal claiming that the action should be tried by the Judge alone without a Jury.

Held, that the present rr. 1 to 7 of O. 36 of the Rules of the Supreme Court are subject to the provisions in S. 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933 and a discretion is given to the Court completely (qualified only by the specific discretion under r. 5) to decide whether it will try a suit with or without jury. The appellate court will not interfere with the exercise of that discretion.

BLAUSTEIN *v.* MALTZ, MITCHELL & COMPANY, (1937) 2 K. B. 142.

Principal and agent—Moneys of A *with* B—B *giving them to his solicitor* C *to be paid to* B's *vendor—Transaction falling through*—B *instructing* C *to get back the money—*C *receiving it back—Claim by* B *against* C—C, *if entitled to plead as* jus tertii *title of* A *to the money.*

An engagement of marriage was entered into between the plaintiff *L* and Miss *S. J.*, a daughter of Mr. *J.* The engaged parties chose a house in which to live after marriage and the plaintiff entered into an agreement to purchase it for 1,725*l.* Mr. *J.* gave a cheque for £172 and odd being the advance deposit to the plaintiff *L* as a gift conditional upon the marriage taking place. *L* paid it into his own account with his bank and gave his own cheque for the same amount to the agents of the vendor. He instructed Mr.

M, his solicitor, to act as his solicitor in this transaction. Mr. *M* was another son-in-law of Mr. *J.* The engagement was later terminated by the parties and then *L* wrote to *M* to get back the deposit amount as he did not wish to proceed with the purchase. The vendor's agents returned the deposit to *M.* Immediately *M* wrote to the plaintiff *L* that Mr. *J* had asked him to account for this money to him. But the plaintiff objected to *J* so dealing with it and filed this suit for recovering the same.

MacKinnon, J., held that on the authority of *Biddle* v. *Bond,* (1865) 6 B. & S. 225, that the defendant was entitled to set up the defence that between him and the plaintiff he is entitled to this money, inasmuch as the money belongs to *J* who has called upon him, the defendant, not to let the plaintiff have it.

Held, by the Court of Appeal (reversing Mackinnon, J.) that here the action was for an account by the principal *L* against his agent *M* and to such an action it is not open to *M* to resist the action by alleging some claim made to the moneys by some other person. *Biddle* v. *Bond* decided only that "where there is a bailment (of goods) and the bailor sues the bailee to recover the goods, or if they have been turned into money their proceeds, the bailee may, if the facts warrant it, say 'I am refusing to give these goods or the proceeds of them to you because they are not yours, but belong to a third person, and on his authority and on his instructions, I am holding them for him'. But here the relationship is not of bailor and bailee but of principal and agent and solicitor and client. The defendant as solicitor and agent was under an obligation to get back the deposit and having got it back he was under an obligation to his client, an ordinary obligation as his agent and solicitor, to return the money to him. In such cases *jus tertii* cannot be pleaded.

THE STRANNA, (1937) P. 130.

Shipping—Bills of lading—Loss of cargo—Exceptions in bills of lading in cases of perils and accidents of the sea—Cargo lost by ship taking a sudden list while loading—If saved by the exception—Cargo carried at charterer's risk—Doubtful as to how listing occurred—If owner of goods bound by the risk.

1,200 standards of timber were shipped by S.S. Stranna in good order and condition. She was lying at anchor in an open roadstead called H. C. taking on board the cargo. When about 12 standards remained to be loaded, the vessel listed to port and carried away the wooden uprights or stanchions on the port side, thereby causing lot of timber to be lost overboard. A floodtide was running at the time. The timber drifted away and was soon lost. In an action by the owner of the goods for the value of the timber lost, the shipowners relied on the exception in the bill of lading, namely, 'perils of the sea .... and all and every other dangers

and accidents of the seas .... even when occasioned by negligence, default or error in judgment of the ...... master, mariners or other servants of the owners". The bill of lading also stated that the deck cargo is to be carried at "charterer's risk".

Held, the provision to carry cargo at 'charterer's risk' would not excuse the shipowners for negligence and the pleaded facts put a duty upon them of furnishing an explanation of how the loss occurred. The loss in this case is a peril of the sea and not merely a peril on the sea. On the authorities it is clear that exceptional violence of winds and waves is not essential to a "peril of the sea" and a quiet undisturbed flow of perfectly calm water into a ship may be a peril of the sea if it enters fortuitously. This was "damage of a character to which a marine adventure is subject" and hence is covered by the exception.

Held, further (though felt unnecessary) that the words "at charterer's risk" will not avail to put upon the owner of goods, the risk of loss through unascertained causes. It may mean that the owner takes the chance of some imperfectly ascertained cause of loss. But it does not confer on the shipowners a right to claim exception from liability in every case in which the cause of the loss is unknown. That will mean that these words excuse the bailee from giving any explanation of the loss of goods.

MORTON *v.* MORTON, DALY AND MCNAUGHT, (1937) P. 151.

Divorce—Alleged adultery of wife with A *and* B *named—Evidence by wife denying adultery with* A*—No evidence by her denying adultery with* B*—If husband can cross-examine her regarding adultery with* B*—"Alleged adultery" in S.* 198 *of Judicature (Consolidation) Act,* 1925*—Meaning of.*

The parties (petitioner and first respondent) were married in 1932. The husband charged the wife with adultery with two named co-respondents *D* and *M* and with one person unknown. *M* neither entered an appearance nor filed an answer. *D* appeared and filed an answer and also gave evidence. The wife also appeared and gave evidence. With regard to *M* there was the evidence of the husband and his solicitor's clerk of an express confession by *M* of the adultery but in a charge of adultery it was not evidence against the wife, though it might be evidence against *M*. As *M* was not called there was no evidence of adultery with *M*. The husband wanted to elicit by cross-examination of the wife the adultery with *M*.

Held, it is not permissible. S. 198 of the Judicature (Consolidation) Act, 1925, provides that no witness, whether a party to the proceedings or not, shall be liable to be asked or bound to answer

any questions tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof "of the alleged adultery". It means that unless and until the wife denied the adultery with regard to which the cross-examination is to be directed there is no right to cross-examine as to that particular adultery. Here there is a general charge of adultery and a charge of adultery with *D* and another with *M*. The only evidence given by the wife was denial of adultery with *D*. She has not given any evidence re-adultery with *M* and hence there can be no cross-examination about that. "Alleged adultery" in S. 198 means adultery with the particular co-respondent.

GREENWOOD *v.* GREENWOOD, (1937) P. 157.

Divorce—Wife's petition—Husband living in adultery—Wife aware of it but conniving at it—Long delay in filing petition—If Court to grant divorce—Supreme Court of Judicature (Consolidation) Act, 1925, *S.* 178.

The parties were married in 1901 and had two children. In 1907 they entered into a deed of separation which provided for a maintenance provision of 1*l.* a week. When the husband became more prosperous, another deed was executed in 1915 providing for 10*l.* a month. Duding all this period Mr. *G* (husband) was living with the lady Miss *W* named in the petition for divorce and it was known to Mrs. *G* from the beginning. In 1920 Mrs. *G* instituted divorce proceedings against Mr. *G* on grounds of adultery and cruelty. It was filed more to get a better maintenance and it was compromised by another deed of 1921 under which she got 450*l.* a year. Her attitude towards her husband was that her husband intended to go on living with Miss *W* and she did not mind about it. In 1932 Mr. *G* resigned his office and his financial position became worse. She accepted 1,000*l.* in full quit. She invested it but the investment failed. Now she brought a petition for divorce against the husband alleging his continued adultery with Miss *W*.

Held, that the wife was guilty of unreasonable delay. The Court is not bound under S. 178 of the Judicature Act, 1925, to dismiss a petition merely because there has been a degree of delay, but the Court is not bound either to pronounce a decree if it finds that a petitioner has been guilty of delay in presenting or prosecuting the petition. After 1920 the action of Mrs. *G* was one of connivance at her husband's adultery and that barred her claim to relief. *Thomas* v. *Thomas,* (1860) 2 Sw. & Tr. 113, applied.

JOTTINGS AND CUTTINGS.

The Three Appointments.—Lord Wright was born in 1869. He was a Fellow of Trinity, 1899—1905, and called in 1900. In

1925, when he was a very distinguished leader of the Commercial Court, he was made a Judge of the King's Bench Division, and he was promoted direct to the House of Lords in 1932. He succeeded Lord Hanworth as Master of the Rolls in October, 1935. His judgments have been strong, clear, and concise—good to listen to and good to read. Sir Wilfrid Greene is fifty-three, and is, it is said, the youngest lawyer to become Master of the Rolls. He was brilliantly successful at Oxford, and his war record was good; he served on several fronts and had three years in the trenches before he became a staff officer. He had one of the largest, most exacting, and most lucrative practices at the Bar. In 1925 he was Chairman of the Committee on Company Law—"the Greene Committee"—whose recommendations resulted in the present Companies Act. Mr. Justice MacKinnon was born in 1871 and became a King's Bench Judge in 1924 in place of Mr. Justice Bailhache, and for some years he has presided over the Railway and Canal Commission.—*L.T.*, 1937, *p.* 331.

Judicial Changes.—Several judicial changes were announced at the beginning of the present week. Lord Wright, who a couple of years ago left the House of Lords to become Master of the Rolls, has again been appointed a Lord of Appeal-in-Ordinary in succession to Lord Blanesburgh, who has resigned. Sir Wilfrid Greene, a Lord Justice of Appeal, has been appointed Master of the Rolls, and Sir Frank MacKinnon, a justice of the King's Bench Division, has been appointed a Lord Justice of Appeal. All these changes are important and interesting, and the appointments have been well received by the Profession. Lord Blanesburgh has done sterling work throughout his long career. Born in 1861, he was called to the Bar in 1884, and soon acquired a very large Chancery practice. He became Mr. Robert Younger, Q.C., in 1900; a judge of the High Court in 1915; a Lord Justice of Appeal in 1919; and a Lord of Appeal-in-Ordinary in 1923. He was principal British delegate to the Reparations Commission from 1925 to 1930, and has presided over a number of Government committees, including that on Unemployment Insurance, which issued the well-remembered "Blanesburgh Report".—*L.T.*, 1937, *p.* 331.

Pronunciation in the Law.—The anomalies of English spelling and pronunciation have always proved a severe stumbling block to foreigners, who are naturally puzzled on both heads, but even to English people, who are supposed to have an intuitive familiarity with such matters as their own language, difficulties strew their path. Some proper names in particular are specially obnoxious to criticism on the ground of their pronunciation being so remote from what might be expected from the spelling. At some of these anomalies, Mark Twain, in the extravagance of his waggery poked

excellent fun as when he said that the English are a curious race, for they have a name spelt "Marjoribanks" and they pronounce it "Chumley"! But leaving aside proper names and coming to some very ordinary dictionary words we find their pronunciation governed by some mysterious power, giving them a sound quite different from what might be expected. It is true that in some special callings words acquire a meaning and sound which they do not possess outside that particular territory. In the law we have a few of these in the matter of pronunciation. For example, there is the word "marital". Only the other day, in the House of Lords, a learned counsel kept pronouncing it "ma-rital", to be eventually instructed from the Woolsack that the orthodox pronunciation is "marī-tal". Is this latter pronunciation of the word general outside the law? In the Oxford English Dictionary only the mode adopted by the learned counsel is given, but in the Concise Oxford Dictionary both pronunciations appear but what may be called the lawyers' method is given only second place. Another word much used in the courts is that applied to the person who has effected a policy of insurance and who is called the "assur-ed," with an accent of the "ed". Many in the insurance world are not a little amused by this pronunciation of a word which they pronounce as a dissyllable, not as trisyllable. Even in the memory of older people certain words even in the supposed conservative atmosphere of the courts have changed their pronunciation. For example, the word "revenue" was at one time both in Parliament and the courts pronounced with the accent on the "ven," and it used to be said that a member of the Bar who had been accustomed to the modern pronunciation of the word, deemed it expedient, on being appointed a law officer of the Crown, to adopt the older and what was regarded as the orthodox style.—*L.T.*, 1937, *p.* 343.

A Famous Lodger in the Abbey.—To take lodgings within the Abbey was a well-known euphemism for taking advantage of the sanctuary as a retreat from the too embarrassing attentions of creditors. We have seen that Sir Walter contemplated the possibility of having recourse to the Abbey precincts; but we find that a later man of literary eminence was compelled by circumstances to spend nearly five years of his life within the circumscribed area out of reach of his creditors. This was De Quincey, a perfect child in money matters or in the conduct of business of any kind. He was forced to seek the retreat which the Abbey offered in 1835, and there he remained off and on till 1840. Occasionally as a "Sunday gentleman" he would visit his friends in Edinburgh, and once at least, forgetting the passing of the time, he remained from one Sunday till the next without his creditors becoming aware of the fact. During his residence within the privileged bounds he was by no means idle, being unremitting in his contributions to *Tait's*

Magazine and *Blackwood's* which he enriched with some of his best work, so that his monetary difficulties left him apparently untroubled, equally as did those of Captain Shandon with his work as editor of the imaginary Pall Mall Gazette.—*L.T.*, 1937, *p.* 419.

Conciliation in Matrimonial Causes.—In a letter that the late Sir Frederick Pollock wrote to the *Daily Telegraph* last November, he urged that the Divorce Court should abandon its practice of treating matrimonial causes on the lines of ordinary litigation. "A court for matrimonial causes should have conciliation for its first object, should have the carriage of the cause in its own hands, and should be entrusted with wise discretion." We noticed the letter at the time (82 Law Journ., p. 362), and Mr. Claud Mullins, whose interest in the subject is well known, reproduces it in an article on "Conciliation in Divorce Cases" in the current *Fortnightly Review*. He points out that the divorce problem has always been considered mainly from the standpoint of the paying client, and for the paying client efforts at conciliation are made before the case comes into Court. The paying client, whether in matrimonial or in other matters, gets both conciliation and litigation. The poor person, says Mr. Mullins, only gets litigation, and this defect is not, he points out, remedied by the help given under the Poor Persons Rules. Magistrates are not directly concerned with divorce. Their functions in matrimonial matters are confined to the making of separation and maintenance orders and the custody of children. But here too there is need for conciliation, and Mr. Mullins gives figures showing the success with which he has employed this method in his own Court. Out of 220 matrimonial summonses issued in seven months, 108 were adjusted either before or after coming into Court; of the remaining 112, which were heard to the end, 23 were dismissed, and 89 final orders were made. As Mr. Mullins says, with extended grounds for divorce, the need for conciliation will inevitably become more acute. The Conciliation Clause which the Marriage Bill contained was abandoned in Committee, but in some form effect should be given to the principle it contained.—*L.J.*, 1937, *p.* 21.

A Free Country.—After a perusal of the daily newspaper on Monday, some of our readers may wonder whether England is really a free country. A Fascist march, we read, took place in London. It was not allowed to proceed through the streets of its own choice. It was "diverted" and controlled by the police, shepherded into a prepared open space in Trafalgar Square. There the leaders were permitted, under close police protection, to express their sentiments. Critics attended in large numbers, but the right of criticism was closely confined to the throwing of an occasional apple, the emission

of derisive sounds and the scattering of anti-Fascist literature, in an ephemeral form, in the streets. Ultimately the procession marched off the field under strict police protection to its point of disbandment. Compare these proceedings with the true liberty of Austria, which on the same day received a striking vindication at the football match between Vienna and Genoa. The umpire (with English ideas) dared to restrain the freedom of a player by awarding a penalty. The players then started a perfectly free fight. The game was frequently suspended while players wrestled with one another on the ground, fought with their fists and went about the field with bleeding noses. Everything went off quite smoothly, and in the end, as the reporter aptly observed, the game was fought to a finish and ended in angry demonstrations. In that free country no grandmotherly policemen intervened to check blows or silence verbal insults. Everybody did what he, or she, liked.—*L.J.*, 1937, *p.* 22.

Paddling Pools.—The decision of the Court of Appeal in *Ellis* v. *Fulham Borough Council* (*Times*, June 26) will, we think, commend itself to parents and children as well as to lawyers. It may be unwelcome to local authorities. Many of these bodies provide paddling pools for children in their parks, and surely there can be no more humane amenity in the crowded cities of to-day. The defendant Council, who were appellants, had such a pool and the simple story was that the plaintiff's son, a small boy, was paddling in the pool when his foot was badly cut by a piece of glass. There was ample evidence that the defendants knew of this kind of danger, though they, of course, did not know of the particular piece of glass. They had a system of raking the pool which was ineffective to meet a danger of which a notice, put up near the pool, showed that they were aware. There was some difference of opinion as to whether the injured child was an invitee or a licensee. The Judge below thought he was an invitee, but two Lords Justices disagreed with him on this point; and it is well to have that high authority upon it. The whole Court agreed, however, that, even if the child were a licensee, the defendants were liable. The duty due to licensees is well put by Lord Justice Greer in *Parkes* v. *Walthamstow Borough Council* (1934, 151 L.T. 30), where the cases are considered. It is a duty to protect against a danger which they *know* and of which the injured person does not know. Some of the cases might justify us in adding a gloss so as to read "when they know or in reason ought to know". However, that may be, the Borough Council knew enough to make them liable.—*L.J.*, 1937, *p.* 23.

Finality of House of Lords' Decisions.—In a note on the decision of the House of Lords in the recent case of *Fender* v. *Mildmay*, *The Spectator*, after alluding to the divergence of judicial opinion

on the question at issue, concluded with these words: "So Miss Fender gets her £2,000. But since five judges in all were against her and only four with her, the law on the point at issue can hardly be said to be convincingly established". Whether one agrees or disagrees with the decision ultimately arrived at, the law is certainly established and can be altered, if at all, only by the Legislature. In earlier days this doctrine was not regarded as clearly settled as it has since become. Thus Lord Eldon, when Lord Chancellor, said in one case that "a rule of law laid down by the House of Lords cannot be reversed by the Chancellor. . . The rule of law must remain till altered by the House of Lords," thus implying that the House had an inherent power to do this. Even Lord Chancellors are, however, not always consistent, for the same occupant of the woolsack, in another case, used expressions to the contrary effect. One of his successors, Lord St. Leonards, declared that the House was not bound by a rule of law, if, upon a subsequent occasion, it should find reason to differ from it, and, he added, that the House like every other court of justice, possessed an inherent right to correct an error into which it might have fallen. Lord Chancellor Campbell took the more modern view that a decision of the House could be varied or reversed only by Parliament. These conflicting dicta were brought before the House and elaborately discussed in *London Tramways Company* v. *London County Council,* (1898) A. C. 375, when Lord Halsbury, Lord Macnaghten, Lord Morris and Lord James of Hereford laid it down as clear that a decision of the House on a question of law is conclusive and binding on the House in subsequent cases, that its correctness in point of law cannot be enquired into, and that its effect cannot be got rid of save by an Act of Parliament, as was in fact done by the Statute 5 Edw. 7 c. 12, which undid in large measure the decision of the House in the Scottish church case.—*S.J.*, 1937, *p.* 577.

In Other Courts.—While normally the decisions of other courts can be corrected, if that is deemed necessary, only by a higher tribunal, the rule in this matter is not so rigid as it has been held to be in the House of Lords. As to the practice of the Judicial Committee of the Privy Council, it was laid down in *In re Transferred Civil Servants* (*Ireland*) Compensation [1929] A.C. 242, that there is no inherent incompetency in ordering a rehearing of a case already decided by the Board even when a right of property is involved, but that such an indulgence will naturally be granted only in exceptional cases. So, too, but only on rare occasions, has it happened that a point of law involved in a former decision of the Court of Appeal, constituted as it normally is of three members, has been reconsidered by a full court consisting of six members, not of course with the object of reversing the actual decision so far as the parties to it were concerned—it cannot do that—but to test

its correctness in point of law. There is something to be said for a similar practice being adopted in the House of Lords.—*S.J.*, 1937, *p.* 577.

BOOK REVIEWS.

BENTWICH PRIVY COUNCIL PRACTICE, Third edition, 1937. Price 35 *s.* net. Published by Messrs. Sweet & Maxwell, Ltd.

Bentwich's Privy Council Practice has been for several years looked upon as a leading text book on the practice of the Privy Council in judicial matters in appeals to that tribunal. This edition which appears after ten years of the prior one will be heartily welcomed by the legal profession as there has been a great change in the conditions of the jurisdiction of the Privy Council by the Statute of Westminster and the consequent legislation in some of the colonies. So far as India is concerned, the large bulk of the Privy Council appeals is contributed by this country and an up to date exposition of the practice of the Privy Council is very necessary for the lawyers and judges here. Further, the Government of India Act, 1935, has introduced important changes by the establishment of the Federal Court which may in course of time lead the legislation affecting the jurisdiction of the Privy Council. The learned author has dealt with the provisions of the Government of India Act of 1935 and the possible changes consequent on the same at pp. 80 to 82 of the book, where he winds up the history of the jurisdiction of the Privy Council in appeals from India. Now that Burma has been separated from British India, the question of appeals from Burma is dealt with separately at p. 99. Since the appearance of the last edition, several decisions on points of practice have been given and they have been noticed in the book. We have therefore no doubt in saying that this edition of the book will be found to be of great assistance to the lawyers and judges in this country and will be widely used to them.

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LAWYERS IN MADRAS IN THE 17TH AND 18TH CENTURIES.

For the first 40 years after the acquisition of Madras by the East India Company in 1639, there was little scope for the profitable existence of lawyers. The place was not very populous, there were no regularly established Courts, and the causes that came on for disposal before such Courts as there were, were of a simple nature not requiring the services of trained lawyers. It was some years before the place developed from a small trading factory, occupying a few acres of ground and having a few fishermen's huts to the south of it, to the populous centre which, with the development of the Company's power, it was to become later. In this respect Madras differed from Bombay which, even at the time it was granted to Charles II by the King of Portugal as a marriage dowry, had already had established in it a regular system of law (that is, the Portuguese law) and regular Courts where practitioners versed in that law exercised their profession. Even after Madras became a regular settlement with a large and growing population and a system of Courts in the eighties and nineties of the 17th century, there were few inducements for trained practitioners from England to settle there. As regards Indians, there does not seem to have been even a single instance of an Indian taking to the practice of law in the Courts of Madras in the 17th and 18th centuries.

The general attitude of the Company towards the profession was not such as to encourage the settlement of respectable practitioners in their overseas possessions, at least in the beginning. It has to be remembered that throughout the 17th century and the greater part of the 18th, the Company,

on account of the monopoly of trade granted to it, imposed severe restrictions upon and exercised strict control over the settlement of Englishmen in any of their factories or possessions. In July, 1674, the Court of Committees of the Company resolved that no Attorneys or Lawyer's clerks should be sent out to serve in the Court of Judicature at Bombay, as suggested by Governor Gerald Aungier " in regard of the inconvenience that may arise thereby, to the increasing of law suits and differences among the inhabitants"; and in 1677 and 1678 they ordered the Bombay Council "to allow no more than are absolutely necessary" as well as "to admit of no Solicitors or Attorneys to plead or manage causes, but such as you shall first allow of upon your knowledge of them to be men of good and honest reputation". The Company further directed them to encourage litigants to manage their own cases. (Fawcett's First Century of British Justice in India, page 61.)

Nor was the attitude of the authorities in India very encouraging or sympathetic. In forwarding to the Company in 1697 the petition of Elihu Yale, the ex-Governor of Madras, wherein he had complained that legal advice was denied him, the Madras Council observed thus:—

> " We have no professed Councillors at Law or Attorneys at Madras, nor do we need them in cases relating to the custom of merchants where every man has liberty to plead his own cause."

Another reason apparently for the practitioners of law not thriving in the Company's Indian Possessions in the 17th Century was the strong attitude against the importation of English Law with all its technicalities, adopted by the Company, especially when the masterful Sir Josiah Child presided over its destinies. In answer to a letter from Mr. Vaux, Judge of the Court of Judicature in Bombay, who had said that "the laws of his country should be the rule he designed to walk by", Sir Josiah Child wrote to him that he expected *his* orders to be his rule and not the laws of England "which were an heap of nonsense compiled by a few ignorant country gentlemen who hardly knew how to make laws for the good Government of their own private families much less for the regulating of Companies and foreign commerce (Fawcett, page 134). Writing to Surat on 14th July, 1686, the Company said that the instructions contained in their several letters were "to have the nature and force of law" (L. B., Vol. VIII, page 160.) Writing to Fort St. George the Company said that all their

orders and directions have the force of laws in Madras and appointed three of the members of Council there "to make a collection out of all our last seven years General Letters of all the orders and directions we have given you". The scant courtesy paid by the Company to the Common Law of England as applicable to Indian conditions found apt expression in the Letter to Surat dated 3rd February, 1687. "The Common Law of England being peculiar to this Kingdom and not adapted in any kind to the Government of India and the nature of the people, as we have formerly written to you and have found by long and useful experience". (L. B., Vol. VIII, page 265.) An expert profession like the legal cannot flourish in a place, if the Laws to be administered by the Courts there are contained in unpublished letters and despatches. It must be said that this particular tendency on the part of the Company was of temporary duration, and disappeared with the disappearance of Sir Josiah Child from the counsels of the East India Company.

Again, barring two exceptions, the whole of the judicial machinery of the Company in Madras during the 17th and 18th centuries till the establishment of the Recorder's Court in 1798 was manned by laymen who have in all climes and at all times looked askance at the professional lawyer. The two exceptions were Sir John Biggs and Mr. Dolben who presided over the Court of Judicature at Madras, the former from 1687 to 1689 and the latter from 1692 to 1694, periods far too short for any marked impression to be left behind.

I have not been able to find out the existence of a single lawyer practising in the Courts of Madras before 1688. In that year the Company, in their despatch to Fort St. George, observed as follows:—

"We would have all persons be allowed to plead their own causes before any of our Courts of Judicature if they desire it, or at their election to make use of some allowed Attorney to plead for them, but no Attorney shall be permitted to plead for any person until he be first allowed to be an Authentick Attorney by Order of Council in writing, and no Attorney shall have that allowance from you till he has paid five pagodas into the Company's cash for such his allowance to officiate as an Attorney (*Quamdiu se bene gesserit*); and you are to appoint what moderate fees they may take of their clients, and what punishment shall be inflicted in case any of them should ask or receive more than their allowed fees; and for paupers the Judge is to appoint some Attorney to appear and plead gratis, as Sir John Biggs knows the manner is here in England, but what degree of estate shall be accounted pauper with

you at Madras, you must resolve among yourselves; a man who swears he is not worth £5 is esteemed a pauper in England, but it may be two pagodas is as good a poor man's estate at Madras as £5 is here." (Public Despatches from England, Vol. VIII.)

This despatch may be taken as the first definite Charter pertaining to the legal profession in Madras. How many availed themselves of the privileges we have no definite means of ascertaining, but that English Lawyers began to settle down in Madras after that date appears from scattered references to them in public records and the writings of travellers. In a letter bearing date 10th February, 1697, from Fort St. George to the Company there is reference to an Attorney by name John Coventry removed for "malpractice". In Charles Lockyer's "An Account of the Trade in India containing Rules for Good Government in Trade, Price Courants and Tables", published in 1711, the following not very complimentary reference occurs with regard to the legal practitioners in Madras:—"Lawyers are plenty and as knowing as can be expected from broken Linnen Drapers and other cracked tradesmen who seek their fortunes here by their wits". Thomas Salmon, in his "Modern History or the present State of all Nations", published in 1724, refers to "Two or Three Attornies" belonging to the Court of Judge Advocate. Alexander Hamilton in his "A New Account of the East Indies", published in 1727, refers to Attorneys and Solicitors pleading in form before Mayor and Aldermen. Attorneys "on horseback" found a place in the procession which inaugurated the Mayor's Court under the Charter of 1726. Col. Love estimates the number of lawyers practising in Madras in 1776 at only six. (Vestiges of Old Madras, Vol. III, page 139.) After the inauguration in 1798 of the Recorder's Court at Madras, Sir Thomas Strange, Recorder, compiled a list of legal practitioners in Madras in 1799, and there were only 13 of them. (*Ibid.*, page 477.) Apparently in the 18th century there was some limit placed on their number, but I have not been able to discover what the limit was. A petition to the Mayor's Court by one Robert Sloper dated 14th June, 1743, for being admitted as an Attorney, runs as follows:—

To the Honourable the Mayor's Court at Madraspatnam. The humble petition of Robert Sloper, showeth:

That the office of an Attorney in this Hon'ble Court having become vacant by the death of Mr. John Russell, your petitioner

humbly begs leave to offer himself to succeed him in that employ, in which your petitioner will not fail using his utmost endeavours to deserve the notice of this Hon'ble Court by acquitting himself of the trust reposed in him with diligence and fidelity.

Your petitioner as in duty bound shall ever pray.

William Dumbleton,
Attorney for Petitioner.

Order passed on Tuesday, the 14th June, Anno Domini, 1743.

Mayor's Court at Madraspatnam.

"The said Robert Sloper is admitted an Attorney of the said Court and sworn in".

Noah Cassamajor,
Registrar.

(Records of Fort St. George; Pleadings in the Mayor's Court 1742 to 1743, page 106.)

The references in the above petition to "vacancy" and "succession" suggest a limit placed on those admitted to practice.

The Company's despatch of 1688 set forth above shows that no Attorney was to be permitted to plead for any person without an Order of the Governor and Council in writing. Whether in the beginning it was further necessary to be formally enrolled by the Court where he intended to practice does not appear, but by 1743 as would appear from the petition of Robert Sloper set forth above, that had become necessary. There is no reference to legal practitioners in the Mayor's Court Charters of 1686, 1726 and 1753. Not till we come to the Charter of 1798 constituting the Recorder's Court at Madras do we find a definite place given to them. The relevant clause of that Charter runs as follows:—

"And we do further authorise and empower the said Court of the Recorder of Madras to approve, admit and enroll, such and so many persons, being *bona fide* practitioners of the law in the said Mayor's Court at Madras, or having been admitted Barristers at Law in England or Ireland, or having been admitted Attornies or Solicitors in one of our Courts at Westminster, or being otherwise capable according to such Rules and Qualifications as the said Court shall, for that purpose, make and declare, to act, as well in the character of Advocates as of Attorneys, in the said Court, and which persons, so approved, admitted and enrolled, as aforesaid, shall be, and are hereby authorised to appear, and plead and act, for the suitors of the said Court, subject always to be removed by the said Court from their station therein, upon reasonable cause; and we do declare that no other person or persons

whatsoever, shall be allowed to appear and plead or act in the said Court of the Recorder at Madras, for and on behalf of such suitors, or any of them: Provided always, and we do hereby further ordain and declare that no person, from and after the date of these, Our Letters Patent, other than the said persons, being *bona fide* practitioners of Law in the said Mayor's Court at the time of the Publication of this our Charter, shall be capable of being admitted or enrolled, or of practising in the said Court, without the licence of the said United Company, for that purpose first had and obtained."

The relevant clause in the Charter of 26th December, 1800, establishing the Supreme Court of Madras is practically the same.

Something may be said about the disciplinary jurisdiction exercised over the legal practitioners. The Company's despatch of 1688 so often referred to above, contemplated infliction of punishment on Attorneys asking for or receiving more than their "allowed fees". In 1696, an Attorney by name Daniel Dubois was debarred from practice for being guilty of contempt and for his suspected connivance in the escape of his friend one Thomas Gullocke from the Marshall's Custody. (Love's Vestiges of Old Madras, Vol. I, page 575.) In 1697, there is reference to one John Coventry removed for malpractice. What the malpractice consisted in does not appear. (*Ibid.*, page 551.) In 1729, Mr. Henry Rumbold practising in the Mayor's Court, was ordered off to England without any reasons given. He petitioned the Home Authorities of the Company. They showed a better appreciation of the position of a lawyer, and, in permitting him to return and directing the Madras authorities to employ him as their Attorney in all cases, observed as follows:—

" Mr. Henry Rumbold has petitioned us to return to your place, from whence we find he was ordered home, but for what reason does not appear, either in your Letters or Consultations, which is a pretty good proof of what he asserts that he was sent off shore by an arbitrary order of the late Governor's, for having been concerned as an Attorney against him in some disputes that he had in the Mayor's Court." (Fawcett, pp. 221-222.)

In 1743 the Mayor's Court found one Henry De Veil "guilty of misdemeanours in his office of an Attorney" and fined him 50 pagodas and directed him to "pay all such charges as have arose in the several complaints exhibited against him". (Records of Fort St. George-Mayor's Court Minutes, 1743 to 1744, pages 37, 41, 42, 43, 45.) In 1744, William Dumbleton was fined 10 pagodas for "not having behaved himself in a proper manner during the examination of the matter in dispute, particularly to the Mayor". (*Ibid.*, p. 170.) In 1784, the

Grand Jury charged Mr. Jones, an Attorney, of having connived at his Dubash acting as "an encourager of litigious suits at Law" and of being "a common Barrator"; and also of having interfered with the fishery of San Thome river in such a manner that the price of fish was much enhanced. The Governor and Council, acting as Court of Appeals, passed a Resolution "incapacitating him from practising as a Solicitor in that Court". The Mayor's Court, on being informed of the same, in its turn, expelled him from practising as an Attorney of that Court. (Love, Vol. III, p. 303.)

It will be interesting to inquire whether there were any regulations governing practitioners' fees. The Despatch of 1688 authorised the President and Council to fix "What moderate fees they may take of their clients and what punishment shall be inflicted in case any of them should ask or receive more than the allowed fees". It also directed that for paupers, the Judge was to appoint some Attorney to appear "Gratis". I have not been able to get at the Table of Fees fixed in the beginning. The Mayor's Court, as authorised by the Charter of 1726, settled, on 29th August, 1727, a Table of Fees for the several proceeding in that Court, and in that under the heading "Attorney's fees" appear the following:—

" All persons that employ an Attorney to act for them in any cause are first to deposit in his hands 3 pagodas, of which he is to give an account when the cause is ended.

Attorney fee one pagoda.

For writing petitions eighteen fanams each side of a sheet of paper. Pleading each Court day and attendance nine fanams.

Translating any paper eighteen fanams a side; to be paid out of that to the Translator six fanams.

Attendance on a client in the White Town nine fanams.

Attendance on a client in the Black Town twelve fanams.

For drawing out the interrogatories in the whole cause 18 fanams."

—(Wheeler's Madras in the Olden Time, Vol. III, p. 29).

Evidently there were complaints that the Attorneys were charging more fees than they were entitled to, for we find that the Mayor's Court had to pass the following order on 27th March, 1744:—

" It is this day ordered that no officer belonging to this Court shall either directly or indirectly from the day of the date hereof receive any sum or sums of money other than their stipulated fees from any person having a suit in this Court while the same is therein depending; and further, that no Attorney of this Court shall refuse to take any person's cause in hand on being feed with the customary fee for that end, on pain of being dismissed

the service of this Court. . . . That in case any of the inhabitants find themselves henceforward aggrieved, they may receive redress by applying to this Court who will dismiss any of the officers thereof, that shall be found guilty of transgressing the above orders."

(Records of Fort St. George-Mayor's Court Minutes, 1743 to 1744, p. 42.)

Even the above order was apparently more honoured in the breach than in the observance, for in 1791 we find the Governor and Council animadverting on "the exorbitant charges of the Attorneys of the Mayor's Court".

The system of double agency which was to become a subject-matter of hot discussion in the 19th and 20th centuries was not in force in the 17th and 18th centuries. Barristers did not appear on the scene till late in the 18th century. The first Barrister to arrive in Madras was Benjamin Sulivan. The Supreme Court having been established in Calcutta under the Regulating Act of 1777, he came over to India in 1773 with the intention of settling down to practise there and shaking the far-famed pagoda tree. On the way he touched at Madras which was then being convulsed with the aftermath of the death of Governor Lord Pigot during his imprisonment by the majority of his Council. Mr. Whitehill, the acting Governor, consulted him on the legal aspects of the case, and induced him to stay on in Madras. A new post of "Standing Counsel" was created, and he was appointed to fill it. He played a large part in the public life of Madras during the remaining years of the century and secured a well-earned reward by being appointed as one of the first two-puisne judges of the Supreme Court in 1800. Apparently the only other Barrister who thought it worth his while to settle down in Madras to practise was Alexander Anstruther who came out in 1798 and became Advocate-General after the establishment of the Supreme Court. With such few Barristers, there was absolutely no scope for the importation of the system of double agency, and every practitioner was allowed "To appear and plead and act".

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SUMMARY OF ENGLISH CASES.

BERESFORD *v.* ROYAL INSURANCE COMPANY, LIMITED, (1937) 2 K.B. 197.

Insurance—Policy—Life insurance—Policy not excepting suicide—Suicide by assured while sane—Administratrix appointed by Court—If can recover the amount due under the policy—Public policy.

An insurance policy provided that "unless it is otherwise provided in the schedule, this policy is free from all restrictions as to residence, travel and occupation and subject to endorsed conditions is indisputable". Cl. (4) of the conditions provided: "If the life or any one of the lives assured shall die by his own hand, whether sane or insane, within one year from the commencement of the assurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof" with an exception in favour of any *bona fide* interest acquired by a third party before such death. *R*, the holder of the policy, shot himself, while sane. The policies were more than one year old by then and up till death the premiums were regularly paid. *R's* personal representatives claimed the amount due under the policies and the main defence was that as *R* died by his own hand, the policies became void. Swift, J., held that while the law would not enforce a contract entered into in contemplation of a man committing a felonious act, there was no reason "why when a perfectly legal contract had been entered into and had been observed by the parties for many years, one party to it should escape the liability which fell on him by alleging that the other had terminated it in an illegal manner when he had stipulated as part of the consideration for the bargain that he would not dispute it except for particular reasons none of which had occurred" and that there was nothing contrary to public policy in holding the insurance company should pay having regard to all the circumstances of these policies.

Held, on appeal, that however absolute in terms the policy might be the court in its inherent jurisdiction will not enforce it as it is illegal and contrary to public policy. The fact that the claim is made by an administratrix appointed by the Court does not make any difference, for it is a promise to pay to the assured only, and can be enforced, if at all, by the personal representative as such and not in her own right. If the assured had taken his life while insane, the fact would not have constituted a defence, as the act of an insane person is not in law his act. But suicide when sane is by English law a felony.

ASHBY *v.* TOLHURST, (1937) 2 K.B. 242.

Motor car—Parking of on private parking ground—Car Park Ticket—Issue of, on fee for same—Cars left at owner's risk—Car

stolen from park by negligence of attendant—If owner of park liable.

The plaintiff, owner of a motor car, parked his car at a private parking ground on payment of the parking charges and received a ticket headed "Seaway Car Park; Car Park Ticket". There was printed on it "Received 1*s*. The proprietors do not take any responsibility for the safe custody of any cars or articles therein nor for any damage to the cars or articles however caused......all cars being left in all respects entirely at their owners' risk. Owners are requested to show ticket when required". Somebody posed as a friend of the plaintiff and took away the car from the attendant. The key of the car was with plaintiff but the thief had obtained access to it by putting his hand through the windscreen. The car could not be found in spite of search and the plaintiff thereupon brought this action against the defendants, owners of the park for damages caused by the negligence of the attendant in handing the car to a stranger without production of the ticket.

Held, the relationship of the parties constituted by the terms of the ticket was one of licensor and licensee and not a relationship of bailment. It only means that the holder of the ticket is entitled to park his car in Seaway Car Park but this does not mean that the proprietors are going to be responsible for it. Therefore the relationship in itself would carry no obligations on the part of the licensor towards the licensee in relation to the chattel there, no obligation to provide anybody to look after it, and no liability for any negligent act of any person in the employment of the licensor. Even if the relationship was one of bailment, the liability was excluded by the clause "the proprietors do not take any responsibility for the safe custody of any cars or articles therein".

DAVIES *v.* MAY, (1937) 2 K.B. 260.

Coal Mines Act, 1911—*Manager of a coal mine—Failure to provide proper refuge holes under S.* 44—*Duty of maintenance cast on others—If manager personally liable—Effect of Ss.* 75 *and* 102, *Sub-S.* (5).

Section 102, sub-S. (5) of the Coal Mines Act, 1911, provides that "No prosecution shall be instituted against the......manager ....for any offence under this Act, not committed personally by such........manager......which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State......" and S. 75 provides that "Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of

or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance." The manager of a mine was charged by the respondents who were not the Inspector and had not the consent in writing of the Secretary of State for the prosecution, on whom a personal duty of supervision was imposed. The charge was that the manager failed to provide proper refuge holes and had thus contravened the provision in S. 44 of the Act. The person that is responsible for the making, maintenance, etc., of the refuge holes is the fireman and the manager would not in the normal course of his duties take part in the actual making, repairing or maintaining the refuge holes.

Held, that there is no express mention of the manager in S. 44 and though they may be offences for which the manager may be prosecuted, if the prescribed conditions are fulfilled, are nevertheless not offences committed personally by the manager. There are sections in the Act which impose a personal liability upon the manager and this is not one of them.

Hannaford v. *May,* (1935) 2 K.B. 385, distinguished.

COOPER *v.* WILSON AND OTHERS, (1937) 2 K.B. 309.

Police—Sergeant—Statutory month's notice of resignation—Expiry of—Chief constable's order of dismissal—Appeal by sergeant to Watch Committee—Watch Committee confirming order of dismissal—Month expired by then—Resignation effective by then—Watch Committee functus officio *by then—Order of dismissal invalid—Chief constable present at appeal deliberation—Opposed to natural justice.*

The plaintiff was an ex-sergeant of the Liverpool police force. He joined service in 1919 and became sergeant in 1933. On 27th July, 1933, he handed in the statutory month's notice of resignation. On August 8, however, the police preferred against him certain charges of offences against discipline, which arose out of the state of mutual hostility prevailing in his domestic life between his wife and himself. On August 14, the chief constable, after an inquiry in which he heard evidence upon the charges, purported to sentence him to dismissal. The head disciplinary authority of the force and the domestic tribunal of appeal under the Police Regulations was the Watch Committee. That Committee, on August 29, dismissed the plaintiff's appeal and also confirmed the chief constable's order of dismissal. Thereafter the Watch Committee refused to hand over to him his accumulated rateable deductions from pay. Had the plaintiff effectively resigned he would

have been entitled to this sum absolutely. The chief constable was present at the deliberations of the Watch Committee. The plaintiff therefore sued the chief constable of Liverpool, a Police Superintendent, and the members of the Watch Committee of Liverpool for a declaration that he was not validly dismissed, that his resignation was effective and that he must be paid the deductions made from his pay while in service.

Held, by the Court of Appeal (Macnaghten, J., dissenting) that the right to dismiss the police constable in a borough remains solely in the Watch Committee. The resignation ran on until August 24 after which date the plaintiff would cease to be a member of the force by reason of the resignation. Therefore when the Watch Committee met on August 29, the plaintiff was no longer a member of the force and the Watch Committee could not *ex post facto* discharge him as from August 14. They had no power and they were unable in law to decide that an ex-member of the force should be treated as discharged. The order of the Watch Committee dismissing him on August 29 was therefore a nullity. From the fact that the plaintiff appeared before the Watch Committee, it cannot be taken that the plaintiff withdrew his notice of resignation.

Where the plaintiff is alleging that he has never been dismissed, he has a right of suit for a declaration to that effect. Neither the fact that he has a remedy to appeal to the Secretary of State nor the fact that he has the power of obtaining a writ of *certiorari* to quash the order of dismissal prohibit his access to the court for a declaration that his dismissal was invalid.

Further the presence of the chief police constable at the hearing of the appeal by the Watch Committee as to whether they would or would not affirm his sentence was contrary to natural justice and that invalidated the decision of the Watch Committee and entitled him to have a declaration to that effect.

PALMER *v.* WATTS, WATTS AND COMPANY, LIMITED, (1937) 2 K.B. 360.

Workmen's Compensation Act (1925), *S.* 9, *sub-S.* (4)—*Accident—Partial incapacity—"Work in the same grade in the same class as before the accident"—Meaning of—It means work immediately before accident, or at any time before the accident.*

Workmen's Compensation Act, 1925, S. 9, sub-S. (4) says that "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the County Court Judge........that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as

before the accident;......the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions as may be provided by the order......"

The workman was employed as a pumpsman and hitcher at a colliery of the appellant for seven years and previously he had been employed as a shipwright. In 1936 he met with an accident to his index finger of the right hand and as a result of it the finger had to be amputated. As a result he was not fit to carry on work as a shipwright. He first got compensation on basis of total incapacity and on June 27, 1936, he applied for arbitration on the question whether he was entitled to compensation on the basis of total incapacity. It was found by the County Court Judge that the workman would not be able to obtain work as a pumpsman and hitcher and that he would have been able to obtain work as a shipwright but for the injury.

Held, that under the section what has to be seen is the employment in which the man was before the accident and discover whether work in that employment is work in the same class of employment as the work which the man now says he would be able to obtain but for the accident. That does not justify an inquiry into work in which the man was engaged at some period before the accident but which had ceased to be his work at the time of the accident.

THE KING *v.* RULE, (1937) 2 K.B. 375.

Criminal Law—Libel—Communication of to a member of Parliament for the constituency—If privileged.

The appellant *R* was charged with publishing defamatory libels, knowing them to be false. *R* is an inhabitant and an elector of Southampton Borough. He wrote to Mr. *C. E.*, one of the members of Parliament for that County, the matters complained of, against a detective-sergeant of police and a Justice of the Peace with the object of inducing him to help *R* to bring those matters to the attention of His Majesty's Ministers.

Held, that a Member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion. In the absence of evidence of malice on the part of *R,* he could not be convicted.

MUTUAL FINANCE, LIMITED *v.* JOHN WETTON AND SONS, LIMITED, (1937) 2 K.B. 389.

Contract—Guarantee—Fear of prosecution of his brother operating in the mind of guarantor—Other party aware of that intention—Undue influence.

The defendant company was originally founded by *W* family, consisting of a father and two sons—namely, *W*, *P* and *J*. The first two *W* and *P* were directors at all material times and *J* was the director until 1931. After that date *J* had ceased to be a director of that business and started a business by himself. The plaintiff company was a finance company formed for the purpose of financing purchasers of motor cars and lorries on hire purchase system. The system is that after the sale is concluded between a buyer and seller, the plaintiff company purchase it from the seller and let it out on hire purchase to the buyer. *J* and one *C* approached one *S* company for sale to them of a lorry on hire purchase system and having settled the sale requested the plaintiff company to finance them. For that purpose the plaintiff company required among other things, a counter-guarantee from the defendant company. *J* furnished accordingly a guarantee purporting to be signed by *W* and *P* and witnessed by *J* but as a fact the document appeared to have been concocted by *J* without the knowledge of *W* his father or *P* his brother and got a cheque for £750 to the seller company and the lorry was handed over to *C*. But in 1936 the guarantee was repudiated by the Secretary of defendant company. Thereupon the plaintiff company sent their managing agent *L* to defendant company and he went and threatened *P* that he could take out a warrant for arrest of *J*. *P* said that his father was very ill and that if *J* were arrested, it might cause his father's death. *L* then insisted on a substituted guarantee. No definite threat in terms was used, but *L* knew that though *P* might not have objected to his brother being prosecuted, he *P* was prepared to consider his proposal owing to his father's health. Both parties had this idea of prosecution in mind and *L* meant and intended that the possibility of a prosecution should influence *P* in undertaking the liability and *P* was to his knowledge so influenced.

Held, that this guarantee was vitiated by undue influence and the guarantors defendants could repudiate it. Undue influence in the Chancery Courts might exist where a promise was extracted by a threat to prosecute certain third persons unless the promise were given. Not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given.

WEST *v.* AUTOMATIC SALESMAN, LIMITED, (1937) 2 K.B. 398.

Practice and procedure—County Courts Act (1888), *S.* 157—*Claim proceedings—Interpleader issue—Claimant successful—Claim to damages for wrongful seizure not claimed therein—Later suit for damages—Barred by S.* 157.

A company called A. S., Ltd., obtained a judgment in the County Court against one *W* and improperly levied execution upon the furniture of a Mrs. J. W. against whom they had no claim or title. On her demanding her furniture, an interpleader issue was ordered in which she made a claim to the furniture but no claim to damages, and on that issue the Court made an adjudication in her favour for the furniture. Mrs. *W* then brought this suit for damages against the company in respect of the wrongful entry on her premises and the illegal seizure of the furniture.

Held, that she (Mrs. *W*) was barred from bringing the suit by reason of her failure to claim it in the interpleader proceedings. Section 157 of the present County Courts Act, 1888, specifically says that in such proceedings the Court "*shall also adjudicate* between such parties, or either of them, and the high bailiff, *with respect to any damage, or claim of or to damages,* arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof . . . .", and as such there is an obligation to adjudicate not only in regard to a claim to the goods but in regard to damages.

Death v. *Harrison,* (1870) L.R. 6 Ex. 15, followed.

Salbstein v. *Isaacs & Son,* (1916) 1 K.B. 1 and Wigram V.-C.'s rule in *Henderson* v. *Henderson,* (1843) 3 Hare 100, referred to.

WHEATLEY *v.* LAMBTON, HETTON AND JOICEY COLLIERIES, LIMITED, (1937) 2 K.B. 426.

Workmen's Compensation Act (1925), *Ss.* 9 *and* 43—*Accident—Total incapacity—Compensation as for total incapacity paid—Subsequent accident and nystagmus—Also total incapacity consequent on it certified—If entitled to compensation for nystagmus also.*

One *J. W.* was a hewer in the respondent's collieries. In January, 1935, he met with an accident in the course of the employment and sustained an injury to his spine which totally incapacitated him. The employers paid him compensation at the full rate of 30*s.* a week till July, 1935, when he resumed work. He remained at work till September, 1936, when he again became incapacitated by reason of the same injury and he received the 30*s.* compensation again from that date. In October, 1936, while he was still incapacitated from the spinal injury, the certifying surgeon certified that the workman was suffering from miners' nystagmus and was disabled thereby from earning full wages. The workman therefore claimed com-

pensation in respect of miners' nystagmus at 24*s*. a week, though he was already in receipt of compensation on foot of the prior accident.

Held, that while a workman totally disabled through one injury is receiving compensation in respect of that, he cannot claim nevertheless to be entitled to receive in respect of a different injury or one or more different injuries compensation on the footing of total disablement. The position here is that from September, 1936, this workman was in fact totally disabled as a result of his spinal injury and he was in receipt of appropriate compensation on that basis. In October the second accident happened which consisted of the onset of the disease called miners' nystagmus, coupled with the disablement certified in the certificate. But at the date of the certificate, as he was already totally incapacitated for work, he had no element of capacity left in him which this new supervening accident could take away. The Court therefore added a declaration that should the workman recover from the injury sustained by the 1935 accident or cease to be totally or partially incapacitated for work as the result of the said industrial disease, he should be at liberty to apply for review claiming compensation on foot of disability from 1936 accident, that is, miners' nystagmus.

In re CRAVEN'S ESTATE: LLOYDS BANK *v.* COCKBURN, (1937) 1 Ch. 423.

Conflict of laws—Donatia mortis causa—*Donor domiciled Britisher—Money's in a bank in Monaco abroad—Power of attorney to son in respect of the moneys—Instructions to son later to collect the same from bank—Death of donor—Law applicable, English law or Monaco law.*

C, who was a British subject domiciled in England, had certain shares and moneys in a bank in Monaco. In 1934 she desired to put them into a joint account in the joint names of herself and her son but as it was not possible under Monaco law, she executed a power of attorney in respect of her monies in the bank. In 1935 she having a pending operation which might prove fatal in mind told her son to get the shares and the bank balance into his own name, as she wanted him to have them in case anything happened to her. Thereupon he (son) instructed the bank to transfer the shares and moneys to his name and the bank carried it out and wrote so to him. But before it was written, *C* died and her estate was administered in England. The question was if *C* had made an effective *donatio mortis causa* of the shares and moneys.

Held, that for a valid *donatio mortis causa,* three conditions are to be satisfied: (1) a clear intention to give but to give only if the donor dies, (2) the gift must be made in contemplation of death, (3) the donor must part with dominion over the subject-matter of the *donatio.* If the matter rested with the power of attorney alone,

there is nothing to prevent the principal dealing with the property notwithstanding it and therefore no parting with the dominion; but the later transfer of the property into the son's name transferred the dominion to the son. The question whether there has been a valid *donatio mortis causa* must be decided according to the English law as it arises in the administration of the estate, but what act constitutes parting with the dominion must be decided according to the foreign law.

In re GLYN VALLEY TRAMWAY COMPANY, (1937) 1 Ch. 465.

Company—Statutory company—Company closed down—Voluntary winding-up of—Debentures—Undertaking of the company assigned to debenture-holders—No charge—Yet assignment of equitable interest—Debenture-holder entitled to priority over unsecured creditors.

G. V. Tramway Company was incorporated by a private Act of Parliament of 1870 and under that and later Acts it continued to carry on and operate a tramway until 1935. But as since 1932 it was unable to trade at a profit, it was voluntarily wound up. It was registered in 1929 under the Companies Act so that all the provisions of Part IX of that Act applied to it. The company had created debentures which were issued under the provisions of the earlier Acts. The question was as to the rights *inter se* of the debenture-holders and the unsecured creditors of the company in the sale proceeds of its assets. By each debenture the undertaking of the company, its future calls, tolls and sums of money and all the estate, right, title and interest of the company in the same is assigned to the lender to hold to the lender until the loan with interest is satisfied. The debenture did not use the word "charge".

Held, the debenture was in a form apt to create in its holder an equitable interest in the undertaking of the company which must take precedence over the unsecured creditor and therefore it gave priority to them over the sale proceeds of the company also.

JOTTINGS AND CUTTINGS.

Previous Convictions.—Judges have often pointed out that it is not enough for a Court to do justice, but the Court must ensure that it is manifest that justice is being done. The weight attached to the knowledge that a defendant has been previously convicted is liable to be out of all proportion to its logical probative value, for which reason the law of this country forbids the use of previous convictions in order to assist in establishing guilt, except in clearly defined circumstances, *e.g.*, in order to show system. Hence an appearance of injustice may be created if a tribunal gives the impression that evidence of previous convictions, only available in the event of a

decision to convict, has been used in arriving at that decision. Two cases which may have conveyed this unfortunate impression (*Davies* v. *Griffiths*; *Murray* v. *Barnwell*) came before the Divisional Court by way of case stated on April 19. In each case the justices, having retired to consider whether the prosecution was entitled to succeed, returned to Court and, without making any pronouncement in open Court as to their finding, inquired whether there were any previous convictions against the defendant. In each case convictions were reported, and these were acknowledged by the defendant. Thereafter the justices again retired, and on their second return pronounced sentence. It appeared that in each case the justices had definitely decided to convict before learning of the previous convictions, and for this reason the High Court dismissed the appeals, but the Lord Chief Justice pointed out that the absence of any indication by the justices of an intention to convict, before they were informed of the previous convictions, was open to serious misconstruction. This would be avoided, and justice would not only be done but would be manifestly seen to be done, if justices were to announce their "verdict" in open Court before proceeding to pass sentence. We respectfully agree.—*L.J.*, 1937, *p.* 277.

Public Policy and Breach of Promise.—Public policy is a matter of legal topicality. During the last fortnight the House of Lords has been concerned with a promise to marry made while the promisor was situate in the twilight world between decree *nisi* and decree absolute. It now appears, from the trend of the argument, that the Law Lords may not be called upon (as was the Court of Appeal last week) to legislate judicially on public policy; theirs only to discover whether or no there be a distinction between the marriage tie before decree *nisi* and the marriage tie after decree *nisi*. Of marriage before decree *nisi* the law is clear, that it is an insuperable bar to a promise of subsequent matrimony [*Wilson* v. *Carnley*, (1908) 1 K.B. 729]. In the present case it is therefore being argued that the delayed operation of the decree is merely a statutory device in the nature of a *locus paenitentioe*. Against this it is contended that a decree absolute is the only proper termination of the marital status, and that the decree *nisi* is nothing more than a necessary preliminary. If the former position be accepted, then there appears to be no reason of public policy to prevent a guilty party, after decree *nisi*, promising to make an "honest woman" of the guilty intervener. On the other hand, if such a promise be valid, the doctrine of "anticipatory breach" may cause some embarrassment. The determination of this point has long been awaited by the legal world, and the arguments will be followed with great interest.—*L.J.*, 1937, *p.* 278.

Motorists Asleep.—The Divisional Court made short work this week (*Times,* April 20) of a decision by magistrates that a motorist cannot be convicted of careless driving if, whilst in control of a motor car in motion, he falls asleep. The most obvious of all duties for the motorist when he is driving his car is to keep his wits about him. A driver who allows himself to be overcome by sleep is neglectful of his first duty to his fellow citizens. We should even be prepared to see an information for reckless driving preferred in such a case. The motorist who continues at the wheel when he feels that sleep is mastering him takes a risk which he must realise, or which any reasonable man must envisage. No certain line can be drawn between reckless and careless driving; but we suggest that in the first case a man faces a risk which he either can see or, as a reasonable man, ought to see, is close upon him, whereas in the second case a man's care and attention have, apart from any special consideration of his state and environment, fallen below the standards to which ordinary reasonable men conform. Into the first category we think the conduct of a man who continues to drive when he must feel that he is unfit to do so obviously falls.—*L.J.,* 1937, *p.* 278.

The Crown Pays "In Any Event".—You have no doubt observed the finding of Lewis, J., in the Revenue case *Brown* v. *Adamson* that a man is not entitled to a deduction in his liability for income-tax in respect of a non-resident housekeeper employed by him and who spends the day performing her duties in his house, but sleeps elsewhere; and that "resident" as used in S. 22 of the Finance Act, 1924, means something more than "present at the appellant's house to an extent sufficient to carry out her duties."

The most remarkable part of the case, however (apart from the ingenuity in argument of Mr. Cyril King, K.C., is the evidence of growing recognition that the cost of ascertaining or determining the law ought not in every case to be borne by a single private individual.

"The Solicitor-General", it is recorded, "stated that as the case would govern the position of a good many people, some of them of modest means, the Crown had agreed to pay the appellant's taxed costs in any event."—*L.J.,* 1937, *p.* 290.

Birrell on Asquith.—Augustine Birrell, K.C., it will be remembered, was a colleague of Asquith in the last Liberal Government, a man of great reputation and a wit; but who was foolish enough to accept the Chief Secretaryship for Ireland at the worst possible time and thereby failed, like most if not all his predecessors in the same office, to enhance his political reputation and prospects. Only two

or three, and they Conservatives, have emerged from that ordeal without serious loss.

Mr. Birrell's autobiography has now been published under the title *Things Past Redress* (Faber and Faber), and is a book full of interest, philosophy and light. One passage on Asquith (afterwards Lord Oxford) may be cited:

"He took briefs as they came, nor did they come with any remarkable celerity, but whenever he had anything to do, he did it so well that you marvelled his progress was not actually quicker than it actually was. In the House of Commons it was the same. When he was not doing anything, and he never pushed himself to the front, it was easy to overlook him, but whenever something fell to his lot to do in the House it was performed with such ease and effect that we all began talking about him and marking him down as a coming leader. I suppose there were ups and downs in his career, but they were not noticeable to the outsider. A "splendid sameness" characterised it throughout. This was also observable in his literary style, for he wrote as well as he spoke. . . This quality of "sameness" was in keeping with his whole character. His architecture was classical, and had no room for Gothic side chapels, into which a poor sinner might steal and say his casual prayers, and come out and go away. You had to march straight up to the high Altar and proclaim your credo, or hold your tongue."—*L.J.*, 1937, *p.* 290.

Lord Dunedin's Recollections.—Besides his contributions to the law as expounded both in the Court of Session, of which, before his appointment as a Lord of Appeal, he was Lord President, and in the House of Lords, Lord Dunedin has more than once, in contributions to the Press sought to enlighten the English public of the distinctive features of Scots law, where it differs from English law, and where the two systems coincide; he also, some years ago, in an article in *The Times,* re-called some of his early experiences at the Scots Bar, and in his occasional appearances in arguing cases in the House of Lords, and of the English counsel whom he met there. Of Lord Deas, the last of the judges of the Court of Session to retain the board Scotch speech, he told an amusing story. The incident occurred at Glasgow, where a murder case was in the calendar, and for the defence of the prisoner an old and experienced counsel had been instructed. The evening after the trial the judge entertained several of the counsel at dinner, and, turning to them, he said: "I hope you young gentlemen took heed of the judeecious way in which Mr. S, conducted his case. He asked nane o' thae silly questions that you do, makin' things waur instæd o' better." Going on for a minute or two in this strain while Mr. S. sat beaming with delight, the judge then, without warning, continued: "To be

sure he hanged his client in his speech!" How Lord Dunedin himself was misunderstood on one occasion was amusing enough. An American lady whom he met at dinner wished to know what his work was, and this he explained, adding that as he had been a long time at it he had the somewhat unusual experience of sitting with colleagues every one of whom had in past days appeared before him. "How interesting," said the lady; "but not, I hope, for crime". He hastened to reassure her on this head. Of his distinguished predecessor in the office of Lord President of the Court of Session, Lord Kinross, he enlarged on one occasion to Sir Edmund Gosse, of his extreme politeness. It seemed that Lord Kinross was entertaining a large company at his country seat, among them being a certain Captain C. who was not a teetotaller, and who imbibed so much of his host's admirable claret that eventually he lay on the floor, unable to stir. He was to have returned to Edinburgh by the last train, but as this was impossible in view of his condition, Lord Kinross rang the bell and said to the butler, "Make up a bed in the blue room; Captain C. has kindly consented to spend the night here". —*L.T.*, 1937, *p.* 360.

Lord Dunedin's Waggish Comment.—Among those who as counsel not infrequently appeared in the House of Lords when Lord Dunedin was sharing in the appellate work of the House and who afterwards proved to be one of his colleagues, was Lord Blanesburgh, who, before his accession to the peerage, albeit only a peerage for life, was Mr. Robert Younger, and to whom it has been said that in those days Lord Dunedin administered a mock reproof for forgetting that he was a Scotsman and what was owing to Scotland. It happened on this wise: the appeal before the House came from the Court of Session, and the question for decision was whether under the will of a Scots lady a Scottish or an English charity should benefit. In Scotland the Scottish charity was successful, hence the appeal of the English charity. Mr. Younger championed the cause of the appellants, and, probably owing to his forcible arguments, he persuaded the House to reverse the Court of Session and hold that the English charity was entitled to the legacy. When all was over, Lord Dunedin remarked in a stage whisper: "Bob, you've won, but you know you are a blank renegade"—an observation which much amused those within earshot and particularly the future Lord Blanesburgh himself.—*L.T.*, 1937, *p.* 360.

Judicial Heredity.—Some time ago attention was called in this column to the Pollocks and Coleridges as signal instances of law running in the family, each being represented in the high places of the Bench in three generations. In this respect they are unique in England, but it is noteworthy that among the present members

of the judicial Bench there are many instances of fathers being followed by their sons. In the House of Lords there are two instances of sons succeeding fathers as Lords of Appeal, the two being Lord Thankerton, who is the son of Lord Watson, and presumably took a territorial title to avoid being confused with his father, the renowned "heckler" of Counsel; the other is Lord Russell of Killowen, whose father we remember best as the greatest advocate of his day and as the equally great Lord Chief Justice, but who, it must not be forgotten, began his judicial career as a Lord of Appeal and so continued till the death of Lord Chief Justice Coleridge opened the way for his return to the Law Courts as head of the Queen's Bench Division. If now we turn to the Court of Appeal and the High Court, we find a number of members of the Bench whose fathers were there before them. In the Court of Appeal there is Lord Justice Romer where his father sat a generation ago, and in the Chancery Division Mr. Justice Farwell; in the King's Bench Division there are Mr. Justice Finlay, Mr. Justice Charles, Mr. Justice Macnaghten, Mr. Justice Lawrence, each the son of a judge; and in the Probate, Divorce and Admiralty Division Mr. Justice Bucknill likewise follows the paternal calling. Surely this makes a remarkable record, probably unique in the history of the English Bench.—*L.T.*, 1937, *p.* 360.

The Law Revision Committee's Report.—The Sixth Interim Report of the Law Revision Committee, which has just been issued, is not the least interesting of the series. Most of the recommendations of the earlier Reports, such as the abolition of the rule that a personal action dies with the person, and the completion of the independence of married women as regards property and liability, have already got on to the Statute Book. The Fifth Report on the Statutes of Limitation appears to have involved too much examination for anything to be done about it. And now, with that Report only a few months old, there comes the Report on the Statute of Frauds and the Doctrine of Consideration. At present we can only briefly refer to it. Hereafter, we shall deal more fully with its very interesting and important contents and proposals. The subjects referred for the consideration of the Committee were: (*a*) Whether S. 4 of the Statute of Frauds and analogous sections of later statutes should be amended or repealed; and (*b*) whether and in what respects the doctrine of consideration requires modification; in particular its effect on the curious rule in *Pinnel's case* (1602), recognised by the House of Lords in *Foakes* v. *Beer* (1884), that a debt is not extinguished by the acceptance of a smaller sum in satisfaction.—*L.J.*, 1937, *p.* 337.

The Statute of Frauds.—The fourth and seventeenth sections of the Statute of Frauds have been for over 250 years the founda-

tion of the law of contract, and the extent of the litigation to which they have given rise has rivalled the importance of the enactments. Generally speaking, the effect is to prohibit the enforcement of all the more usual forms of contract unless a memorandum has been signed. The principle has its advantages. It places a check on unfounded claims. On the other hand, it enables unscrupulous persons to escape their bargains. As regards contracts for the sale of land, this latter result was avoided to a certain extent by the doctrine of part performance, and this part of S. 4 has been transferred to S. 40 of the Law of Property Act, 1925, but not so as to affect the law relating to part performance. With contracts relating to land the Report of the Committee does not deal. The other matters in S. 4 of the Statute of Frauds include guarantees—the section was varied as to these by S. 3 of the Mercantile Law Amendment Act, 1856—and agreements not to be performed within a year. Section 17 of the Statute of Frauds, which required for the enforcement of a contract for the sale of goods of the value of 10*l.* or upwards a memorandum in writing, or else acceptance of part of the goods or part payment, has been replaced by S. 4 of the Sale of Goods Act, 1893. The Committee recommend that all these enactments shall be repealed, and the enforceability of contracts placed on a new basis.—*L.J.*, 1937, *p.* 337.

The Doctrine of Consideration.—This new basis is found in the offer of alternative forms of contract; if there is no consideration the contract must be evidenced by writing; if there is consideration writing will not be necessary. This appears to strike at the root both of the Statute of Frauds and of the English doctrine of consideration as distinguished from the Roman *causa.* Consideration corresponds to the familiar *quid pro quo,* and this has hitherto been necessary for the validity of a contract merely in writing; with a contract under seal it is different, for sealing implies a consideration. According to the doctrine of *causa* a contract requires for its validity not necessarily a *quid pro quo*; a good reason for the contract, such as a moral duty, will suffice. The Report does not adopt this doctrine, but if the parties put the contract into writing, neither the reason nor consideration will matter. If they do not, then, in the absence of sealing, a *quid pro quo* will still be essential. The rule in *Pinnel's case* is to be abolished by recourse to the device of pretending, which was used so freely in the Property Acts. It is the draftsman's device that for a particular purpose something shall be "deemed" to be what it is not, *e.g.*, for the purpose of a statute a woman shall be deemed to be a man. And so *Pinnel's case* is to be ruled out by providing that an agreement to accept a smaller sum in discharge of a larger is to be deemed to have been made for valuable consideration; though, if the new agreement is not performed, the original obligation will survive.—*L.J.*, 1937, *p.* 337.

Humanising the Poor Law.—The Poor Law has not always been regarded as a model of consideration and humanity, but this, according to an address given recently by Sir Kingsley Wood, the Minister of Health, is the ideal which is now being aimed at. The address was given at Bristol on Saturday, the 1st instant, to the 25th Annual Conference of the National Association of Relieving Officers, and Sir Kingsley said that the Poor Law was now a social service; a humanitarian spirit animated its administration, and the human and personal touch had superseded old mechanical methods and routine. This represents a considerable advance on the administration of the Poor Law as depicted in Dickens' pages, but in social matters those are far distant days. To take the tramp off the road, and to persuade young men to enter hostels and train themselves for a useful life, these, Sir Kingsley Wood said, were the results of the present administration of the Poor Law, and the proceedings in Magistrates' Courts have been humanised on parallel lines by the development of the probation system and the establishment of juvenile courts. A cynic might say that juvenile courts have become necessary in consequence of the increase of crime among the young. But the increase has been explained by the unusually large number of boys who have in the last two years attained the "dangerous age" of 14 and 15, and improved administration of the law results, it may be, in their being oftener found out. At any rate, it is interesting to find both the Ministry of Health and the Home Office alive to the importance of humanising, the one the Poor Law, and the other the Police Court.—*L.J.*, 1937, *p.* 337.

Bailee or Licensor.—Of course, the Court of Appeal must always be right—unless and until its decision is reversed by the House of Lords. We feel much sympathy for the respondent in the recent case of *Ashby* v. *Tolhurst* (*Times,* May 7). He was deprived of a judgment, gained in the County Court, which appears to contain all the elements of justice and common sense. The respondent left his car in the appellant's car-park, a private piece of ground, and paid the attendant a fee for the privilege of leaving it there. The attendant gave him a ticket on which there was entered a clear declaration that the owners of the park would take no responsibility for the safe custody of cars left with them, and said that they were left entirely at owners' risk. While the owner was away a thief came and, by pretences which seem to us perfectly transparent, got possession of the car. He had not the ticket, he had not the key, he had nothing but such a story as any thief might make up. The respondent never saw his car again and sued for negligence and conversion. He won his case below, but made no impression on the Court of Appeal to which the park-owner carried him. Of course, a ticket may contain such conditions as

this, and if they are brought to the notice of the depositor they bind him. But, ticket or not, many people think that if a man holds himself out even as no more than a licensor to intending licensees, he is liable for a dereliction of common law duty as was here disclosed.—*L.J.*, 1937, *p.* 338.

Discretion in Divorce.—*Sheldon* v. *Sheldon* (*Townley, formerly Murray intervening*) 1937, 1 All. E. R. 779) is, indeed, a remarkable instance of judicial courage, of a learned Judge exercising his discretion upon broad and human principles in circumstances where, not many years ago, such an exercise of discretion would have been quite inconceivable. The petitioner for divorce admitted that for many years she had committed adultery in the nature of prostitution. The evidence of the parties was "utterly irreconcilable". Seduced by her husband, who was 13 years her senior, she stated that he had treated her after marriage with cruelty, given her no money, forced her to go on the streets, and had taken her earnings from her. Her husband, on the other hand, said that he treated her well, knew nothing about her mode of life until shortly before she left him, and had unsuccessfully endeavoured to reclaim her. Bucknill, J., accepting the evidence of the wife, held that the husband acquiesced in her conduct, and, indeed, that his conduct conduced to her adultery. They were married in 1922; there was a child born that year; she left him in 1928, and until 1934 she continued her mode of life. That was the difficulty of the case; but he had made it impossible for her to return, and had failed to keep up his covenanted payment of 25*s*. per week. Bucknill, J., after considering the principle laid down by Lord Merrivale, P., in *Apted* v. *Apted and Bliss*, (1930, P. 246, at p. 259) that "the interest of the community at large in maintaining the sanction of honest matrimony is a governing consideration," resolved to exercise his discretion in the petitioner's favour. There was no chance of a reconciliation; was the wife to be kept in "the same dreadful servitude" for ever? It was not in the interests of the State that this state of affairs should continue; and it was certainly in the interests of the child that some decent home should be set up. Bucknill, J., was very glad to grant her a decree.—*L.J.*, 1937, *p.* 339.

The Probation System.—Lord Hewart, C.J., again emphasised the importance and value of the probation system at a recent dinner in aid of the Clarke Hall Fellowship for the development of juvenile courts and probation, at which the Duke of Kent presided. The learned Lord Chief Justice pointed to the danger of a youth getting used to prison and emphasised his conviction that the real hope was to save the young offender. "If", the speaker said, "you look at any tolerably accurate account of the inhabitants of prisons you will find that an awful number of them went to prison for the first time when

they were quite young. The wise and prudent course is to save those youngsters from making acquaintance with gaol, a doctrine that has been universally recognised. The difficulty is to get the right people for the work. I have not sufficient words of praise for the devotion of probation officers. I am impressed with the fact that there are many delinquents still sent to prison at an early age. I do not wish to make any reflection upon any person who has to administer the criminal law, but nearly every morning when I sit in the Court of Criminal Appeal and hear appellants, I am impressed with the fact that many are sent to prison at a very early age. The root of this trouble, as is the root of so many troubles, is mere selfishness and the particular selfishness which exhibits itself in indolence. When a young offender has pleaded guilty or when he is found guilty by a jury, it is so easy either to bind him over to come up for judgment if called up or to pass a slight sentence of imprisonment—one, two or three months. What is really needed is the care and patience required. I am not drawing any distinctions or singling out any tribunal. To put an offender under the care of probation officers is a method that calls for a little care and thought, but in my opinion there is no single matter of greater importance in the administration of the criminal law of this country than a wise application of the probation system". We have previously alluded to this subject in these columns and, indeed, quoted words of the Lord Chief Justice in this connection. But its intrinsic importance and the occasion provided by the aforesaid speech justifies this further reference to the matter.—*S.J.*, 1937, *p.* 405.

Payment of Members.—The debate on payment of members which took place in the Commons this week reached a high level and, we think, a satisfactory conclusion. Most of the arguments against raising the salary of members from 400*l.* to 600*l.* a year were really arguments against the payment of any salary at all. The question of principle was settled, for good or ill, before the war, and our middle-aged readers know as well as the Prime Minister does that the cost of living has increased 50 per cent. since the halcyon days of King Edward the Seventh. It appears that the poorer members of the House are sometimes even unable to buy enough food for themselves and their families. Some people still think that such men should not be in the House of Commons at all; but it is now too late to say so. On the whole it is much better that they should be paid by the Paymaster-General than by their local supporters or unions. The other plan would make them mere delegates of the subscribing constituents and must militate against independence of thought and action. A fair salary will help independence. But will it produce the legislative ability for which lawyers hope and which the whole country needs?—*L.J.*, 1937, *p.* 437.

Signing a Will.—It is, of course, well known that a will may be good though not signed by the testator with his name. But if he does not sign there must be evidence that whatever mark was put on the will was put there in his presence and by his direction. An interesting case of the kind came before the President this week (*Pickerill* v. *Pickerill, Times,* June 21). A testatrix, unable to write and apparently too feeble to speak, asked her doctor to sign for her. This he did. In token of assent she pressed his hand. This was held a good execution. There are some interesting cases in the books Sir Creswell Creswell held in 1863 (*Jenkins* v. *Gaisford,* 3 Sw. and Tr. 93) that a testator could validly sign a will by telling his seqretary to mark it in the right place with an engraved signature. This, we may assume, impressed on the paper a copy of the testator's ordinary signature. The testator, as he got old, had difficulty in writing and got this engraving made, which his secretary often used for signing letters. The secretary was able to swear that the mark was put on the will by him both in the presence and by the express direction of the testator and in the presence of one of the attesting witnesses—the seqretary himself being the other. The learned Judge upheld the will. On the other side of the line is *Kevil* v. *Lynch* (Ir. 8 Eq. 244). The testator was not able to write and gave a priest instructions to prepare his will. This was correctly done, but the solicitor concerned went too far and signed the testator's name. It was shown that the testator verbally approved the will and actually put a pen on the name which the solicitor had written; but there was no evidence that the pen contained ink or that the testator made any mark with it. On these facts the Irish Court of Probate refused to presume due execution.—*L.J.,* 1937, *p.* 437.

Lying Affidavits.—Goddard, J., the other day, made some severe strictures upon "lying affidavits" set up under Ord. XIV with the object of obtaining time and leave to defend (*Times,* June 18). 685*l.* had been obtained on loan for an alleged invention to prevent motor cars from skidding; the defendant was neither present nor represented. "These lying affidavits", said the learned Judge, "will not be stopped until the Director of Public Prosecutions decides to prosecute a few dozen of these defendants for perjury". There appears to be an unnatural and excessive reluctance on the part of the authorities to institute prosecutions for perjury. Law, as a rule, lags behind public opinion, but in the matter of perjury public opinion appears to lag behind the law. If papers were more frequently impounded, the standard of truth in the witness-box would be vastly raised. But is there not a simpler remedy to hand? In the law, as elsewhere, prevention saves the time, the energy and the money of

the client. If the Masters of the Supreme Court, upon an application for summary judgment, did not automatically give leave to defend simply upon an *ipse dixit*—a "triable issue"—set up in an affidavit, but required a certain corroboration and refused leave to defend when they were not satisfied with the affidavit, or at least imposed terms, that would put a stop to lying affidavits and incidentally give the plaintiff at the outset the remedy to which he is entitled—as was clearly the intention of the Rules. But if the Court of Appeal is tramelled by a long list of decisions from taking this view [*see* the case of the *Polish Bank,* (1932) 2 K. B. 353], Ord. XIV, r. 1, should be amended.—*L.J.*, 1937, *p.* 438.

Blackstone and the Commentaries.—"Twice in the history of England", says Maitland, "has an Englishman had the motive, the courage, the power to write a great, readable, reasonable book about the English law as a whole". The two were Bracton and Blackstone. When Blackstone wrote, the American Colonies were waiting for the "reception" of English law, and they received it in the guise of his Commentaries. And after the American Republic started on its separate and vigorous course, the Supreme Court endorsed the doctrine that the Colonists had brought the law of their Motherland with them into the new country. But it was Blackstone's law that they brought, mainly through Colonial students who entered at the temple and carried the Commentaries back with them. Since those days law in the two great English-speaking countries has widely diverged, and in diverging it has become very different over the water and here from Blackstone's law. But none the less the debt of America to the first institutional writer who "taught jurisprudence to speak the language of the scholar and the gentleman" is still recognised, and when the American Bar Association paid their memorable visit to this country in July, 1924, one of the leading incidents was the presentation to the British Bar of the Statute of Sir William Blackstone which now stands in the Central Hall of the Law Courts, and the speech of the Hon. George W. Wickersham on the occasion in which he quoted Lord Bryce's description of the Commentaries as one of the links which best bind the United States to England.—*L.J.*, 1937, *p.* 439.

Blackstone without the Commentaries.—The above remarks deal with the memory of Blackstone as handed down in the Commentaries; but they have been suggested by an article on "Blackstone—Outside the Commentaries", by Mr. C. H. S. Fifoot, in this month's *Fortnightly Review.* Lord Birkenhead, when he included Blackstone in his *Fourteen English Judges,* recognised the variety of his activities: "He had a distinguished career at his University; he figured in Parliament; he attained at least a considerable position as an advocate, and he for ten years sat on the Bench. He

prepared a well-known series of reports". But Lord Birkenhead ends, as might be expected: "His chief fame rests on his *Commentaries*." It is those activities outside his chief fame with which Mr. Fifoot deals. Had he not found in law his main attraction, he would be remembered as a vigorous administrator in University and college affairs at a time when Oxford was beginning to reawake to renewed life. He found the Clarendon Press in a state of suspended animation, and to ensure reform he made himself a master of "the mechanical part of printing". He anticipated the transport requirements of a later day. "He planned a western road from Oxford through Botley," and at Wallingford, of which he became Recorder in 1749, he promoted two new roads and secured the rebuilding of St. Peter's Church. He acquired practical acquaintance with architecture, embodying his learning in an essay on the "Elements of Architecture", and thus equipped he "supervised the new and handsome buildings of the Queen's College on the High Street, which, before his efforts, had been little better than a disgusting heap of ruins". And he made excursions into antiquities and literary criticism. "Antiquarian, reformer, man of business, man of letters, his interests were catholic enough to satisfy the most exigent of modern dons".—*L.J.*, 1937, *p*. 439.

Sir Harry Eve.—The dinner given in Lincoln's Inn Hall last Monday in honour of Sir Harry Eve was a fitting recognition of the position he attained during his long tenure of judicial office in the esteem and affection of the Chancery Bar. The dinner was organised by the Chancery Bar Association on behalf of past and present members of the Chancery Bar, and from the speech in which Lord Maugham recounted Mr. Justice Eve's career and his character as a Judge it would seem that the taste for advocacy acquired by listening to the Tichborne trial diverted him from sheep farming in Australia to the practice of the law in England. However that may be, it was generally understood that Mr. Justice Eve was equally at home in the country and on the Bench, and so no doubt there came to him the character of a Judge not less humane than ltarned, well described in verses by "J.M.G.", which graced the menu card:—

In human nature deeply versed,
To human frailties wisely blind,
Courageous, lucid, patient, fair,
Considerate, courteous and kind.

Not his the laboured epigram
Or jest evolved by midnight oil,
But happy and impromptu wit
That sparkled through the day's dull toil.

—*L.J.*, 1937, *p*. 39.

Caring for Children.—The decision of the Court of Appeal in *Ellis* v. *Fulham Borough Council,* (1937) 3 All. E. R. 454, on which we made comment last week, has been followed by another on closely similar lines (*Coates* v. *Rawtenstall Corporation, Times,* July 14). This was the case of a little boy less than four years old who was badly injured while sliding down a "chute" at the defendants' playground for children. The small boy was taken there, we suppose, for a treat by his cousin, a boy of 14. Together they went down the chute, the child safely lodged between his elder's knees. At the bottom of the chute some mischievous or careless person had left a chain across the fairway. It could not have been left or placed there if the defendants had kept their chains (which they used to close the chute on Sundays) in proper safety. Of course they did not know that this chain was in the position which caused the accident; but they either knew or ought to have known that if chains are left about unfastened mischievous boys will get at them and may cause accidents such as that which occurred. The decision seems to give ground for the gloss which we suggested last week as an addition to Lord Justice Greer's judgment in the *Walthamstow case* (*ante,* page 23). Even a licensee, we should say, may claim to be protected against dangers of which the author ought in reason to know, whether he does know of them or not.—*L.J.,* 1937, *p.* 40.

Copyright.—Many people who have adventurous experiences in life undertake to commit them to paper in such form as to make them palatable to the public. So a man may have won a thousand races on the turf, escaped from Chinese pirates and been charged by a rhinoceros which he shot at the last instant, and yet, when he comes to write about these things, be a mere child. This is the sort of thing which happened in the case of *Donoghue* v. *Allied Newspapers,* (1937) 3 All. E. R. 503, and a few years ago led to the decision in *Evans* v. *Hulton,* (48 T.L.R. 489), where all the cases are collected. If the man with these thrilling experiences in his memory sits down beside a mere secretary who writes or types everything at his dictation, of course the secretary takes no copyright. But sometimes this mere child, as we call him, goes to a professing journalist. There are many whose skill will make his adventures appear even more hair-raising than in truth they were. They know, too, just what those tiresome editors want. If this is done the copyright is in the journalist. Unless the mere child is careful to make a pretty strict agreement with him he will have no chance in the Chancery Division.—*L.J.,* 1937, *p.* 41.

Before His Time.—There was a peer of the County Kerry, in what is now known as the Irish Free State, who was also a member of the House of Lords about the middle of last century. He had

never made a speech in the House. That is to say, until the time when, according to the reports handed down in the said Kerry County or Kingdom, an important measure of reform was about to be introduced. He then declared that he would make his maiden speech, and dropped a hint that his intervention in debate would be sensational and decisive. The whole kingdom and county was agog with pride and expectation of their peer; but when the report of the Lords' debate was received, it was found that his remarks, though audible in every part of their Lordships' House, were confined to a paraphrase of certain Apostolic words. The verbatim report was as follows: "He that provideth not for those of his own household is worse than an infidel, and hath denied the faith."

These words, it was said, had no perceptible bearing on the measure before the House or influence on its ultimate form. But can it be said with certainty that his words did fruitless fall, having regard to the following recent report?

"Nearly 250 members of Parliament, of all political parties, have signed a memorial to the Prime Minister asking the Government to grant facilities for the Inheritance Bill to be passed through its remaining stages during this Session. The Bill gives to a spouse or child left without reasonable maintenance the right of appeal to the Courts, which are empowered to take all the circumstances of the case into account, and, if they think fit, to make suitable provision out of the estate of the testator."—*L.J.*, 1937, *p.* 52.

Of Contempt and Imprisonment.—To those justices who for the enforcement of matrimonial and similar orders have an abiding faith in the persuasive power of imprisonment, I would commend the attitude of High Court Judges as expressed by Langton, J., in his remarks to that Mr. Richard Frederick Tagg who had spent a night in custody for contempt in respect of his failure to appear on subpœna in a divorce case:

"You have set the law at defiance. Your statement that you spent the conduct money is neither an explanation nor excuse. You would have no one to blame but yourself if I committed you to prison for such a term as I thought would purge you of contempt of Court, but in common with all other Judges I have the greatest reluctance in depriving any young man of his liberty."

The statement might also be favourably compared with that of a bygone Judge who thus addressed a wrongdoer: "Do you not know that I could, if I would, sentence you to a period of imprisonment for exceeding the term of your natural life?"—*L.J.*, 1937, *p.* 52.

Masters who Reached the Bench.—Among those of later times among the Masters in Chancery who, having served what may be called an apprenticeship in that office, were called to come up

higher, was Alexander Thompson, who was appointed a Master in 1782, and four years later was promoted to the Bench of the Court of Exchequer, and, after twenty years as a puisne, was told to come still higher as Chief Baron. Foss tells us that to his deep learning was united a great love of jocularity. The wags of the day had their little gibe by calling him "The Staymaker," from a habit he had of checking witnesses who were going too fast. A later Master, William Alexander, was appointed a Master in 1809 by Lord Eldon, and raised to be Chief Baron in 1824 "to the surprise and somewhat to the dissatisfaction of the Profession". Ultimately he was induced to resign to make room for Lord Lyndhurst, who, having held the great seal, was content to take the lower seat still the higher was again available for him, as it was in 1834. The latest instance of a Master in Chancery attaining to the higher position of judge was Richard Torin Kindersley, who was made a Master in 1848, and so remained till 1851, when he was appointed a Vice-Chancellor. One of the oddest instances, however, of vicissitudes of the Profession was the acceptance by Sir William Horne of the post after holding the great position of Attorney-General—a fresh illustration of the familiar saying that the race is not always to the swift or the battle to the strong.—*L.T.*, 1937, p. 52.

Northern Ireland.—The constitution of Northern Ireland is an admirable document and has on the whole worked well in a difficult period. Like all Parliaments, however, whose powers are circumscribed by a fundamental instrument, the Parliament of Ulster is liable to have its measures challenged on the ground that they exceed those limited powers. This occurred in the case of *Gallagher* v. *Lynn* which was decided a few days ago in the House of Lords [(1937) 3 All. E. R. 598]. The appellant was a dairy farmer in a part of Ireland which is not within the jurisdiction of the Parliament at Belfast. That Parliament had passed a Milk Control Act which provided that milk dealers must not sell milk without a licence. The terms of the licence were such that full compliance could not be made with them unless the Northern Ireland Inspectors could walk over the border and function beyond it. The appellant farmer apparently ignored the law as *ultra vires* and sold milk in Londonderry without a licence. When he was fined he challenged the validity of the Milk Act as a law "in respect of trade" with a place outside Northern Ireland. In no Court has he made good his challenge. Following the "pith of substance" Canadian cases (such as *A.G. for British Columbia* v. *A.G. for Canada*, 1937, A.C. 368), the House held that the law was in its main object a law for the health of Northern Irishmen. It could not be challenged because, incidentally, a farmer in Donegal felt its effects.—*L.J.*, 1937, *p.* 57.

The Rest of Ireland.—Whilst Northern Ireland appears to be working happily, subject to these unavoidable challenges, under its Constitution of 1920, the rest of Ireland has by a small majority approved of and "given to itself" a new one. The draft Constitution of "Eire" is an interesting document. It makes a bold claim to the whole territory of Ireland—the "Free State" as constituted in 1922 and the area of jurisdiction of the Ulster Parliament; but admits that this claim cannot at present be made good in fact or law. The Constitution therefore only claims at present to be a Constitution for the Free State. In choosing the component parts of their instrument, the designers have had, or taken, a perfectly free hand. They have used many English precedents, but they have also looked across the ocean and borrowed here and there from the Constitution of the United States. The President will be a powerful person. Once elected, he holds office for seven years and he is to have not only a Ministry but also a Council of State. The latter body he is directed by the Constitution to consult on certain occasions, and on these he is not required to act on ministerial advice. The possibility of a conflict between the President's Ministers and his Council seems at all events possible, and we cannot find in the document any prepared instrument for settling it. The reference by the President of questions on *ultra vires* legislation directly to the Supreme Court is no doubt a sound idea. Mr. De Valera has learnt something from the recent troubles of Mr. Roosevelt.—*L.J.*, 1937, *p.* 57.

His Majesty's Judges at the Mansion House.—The Lord Mayor, Sir George Broadbridge, invited a large number of distinguished guests to a banquet at the Mansion House on July 6 to meet His Majesty's Judges. In proposing the toast of the Lord Chancellor, Viscount Hailsham, the Lord Mayor said that he was the son of a wonderful father, the founder of the Polytechnic. As Douglas Hogg, Jun., he had been brilliant and in great request; as Douglas Hogg, K.C., no less so. He was an old Etonian, had served in the South African War, and was an ex-president of the M.C.C. In 1922 he had entered Parliament, whence his rise had been rapid: Attorney-General, Lord Chancellor, Secretary of State for War, Leader of the House of Lords, and now Lord Chancellor for the second time, the greatest honour in the world of law. The whole company were very pleased to see him back again after his serious illness. The administration of the law would never suffer, nor the debates in the House of Lords lose any of their impartiality, while he was on the Woolsack.

Viscount Hailsham, in reply, said that a Lord Chancellor spoke in the Mansion House as in some sense representing the law, and spoke there with peculiar appropriateness, for the City had been for so many years not only the repository of ancient tradition, but

dependent for its daily existence on the proper administration of the law and on its adaptation to modern needs and purposes. The past twelve months had seen the departure from the Bench of four men who, in one capacity or another, had given the best years of their lives to the administration of justice. His old and dear friend, Lord Blanesburgh, after bearing for years the burden of ill-health, had found himself unable to sustain any longer the toil of the work of a Lord of Appeal in Ordinary. The Bar and Bench of the Chancery Division would miss the ever-genial and ever-young presence of Sir Harry Eve, and their King's Bench colleagues would long miss the experience of Sir Thomas Horridge and the distinguished attainments of Sir George Talbot. The whole profession would offer its best wishes to all these men in their retirement, and its gratitude for their years of service.

The Lord Mayor, proposing the health of His Majesty's Judges, said that British justice was the admiration of the world. One thing he admired about the judges was that they all seemed to attain a ripe old age. He supposed that the nice restful life, sitting all day on the Bench, being lulled to sleep by the voices of witnesses and Counsel, was one of the pleasantest lives a man could have. It seemed to agree with the Lord Chief Justice, who appeared to have taken on a fresh lease of life after a very distinguished career including the offices of Solicitor-General, Attorney-General, Cabinet Minister, and one of the British signatories to the Irish Peace Treaty.

The Lord Chief Justice, Lord Hewart, in reply, said that Judges lived long because, before they got to their comparatively exalted and decidedly impecunious position, they had gone through a very hard mill, having survived which they could survive anything on earth. He congratulated Lord Hailsham on appearing at a Mansion House again restored to health, and declared that nothing was less desirable or desired than that there should be a change in the office of Lord Chancellor for many years. Sir Thomas Horridge and Sir George Talbot were both dear friends of his, and both had retired earlier than they would have wished, not because of their nice restful life, but because of prolonged public service, during which each of them had been compelled to struggle with ill-health. Their friends would deplore their loss and cherish the recollection of their courage. The great resources of an incomparable Bar were, however, always ready to provide successors. In the new King's Bench Judge, Mr. Justice Wrottesley, they had not only a lawyer but also a scholar. He would indeed be a reinforcement to the King's Bench Division.

Lord Atkin, who proposed the health "The Profession of the Law", said: "We who profess and call ourselves lawyers now have the opportunity to proclaim ourselves lawyers and to diminish our own shortcomings, an opportunity not always given to or used by

those who propose this toast. They generally suggest in a friendly and jocular manner that lawyers are, after all, persons who promote strife, pervert truth and, for a large reward, darken counsel. I am sorry to say that people sometimes think it necessary to address that jibe to lawyers, either as to the amount of their fees or as to the uncertainty of their advice. The so-called uncertainty of the law is not in the main due to any defects in the law or in lawyers, but to the apparently unconquerable disability of laymen to express themselves with inevitable clearness."

The Solicitor-General, Sir Terence O'Connor, K.C., said that the order that he should wear levee dress with a sword at the Banquet was characteristic of the popular view of his profession. "It is as combatants," he said, "that the public like to think of us advocates; it is as combatants that they hire us, and it is from those who wish to do battle that we gain our bread and our butter, and the more they wish to fight the more butter we get. I should bore many of you by reminding you of the Indian case where one Indian was suing another for the trespass of the second Indian's cow on his field. It was discovered for the first time in the Privy Council that the one Indian had no cow and the other Indian had no field. Among others who provide fodder for the Bar are those who insist upon their rights. Sir Philip Game, the Commissioner of Police, in connection with Belisha crossings, referred to

'. . . . . poor Will Jay,
Who died defending the right of way.
He was right, dead right, as he strode along,
But he's just as dead as if he'd been wrong!'

If it were not for the Will Jays and the Indian temperament we should have a poor time as practising barristers. When we are chided for our advocacy we are apt to forget sometimes that the law is not an exact science. Thank God for that! There is no absolute in the law, and there is a great grain of wisdom in the reply of the gentleman who, when he was asked 'What is the Rule in *Shelley's case*?', answered 'that it was the same as in any other case, because the law was no respector of persons'." Sir Terence also commemorated the student who, when asked to distinguish between a mortgagor and a mortgagee, had answered, "There is no distinction between a mortgagor and a mortgagee since the Sex Disqualification (Removal) Act," and observed: "Behind this frivolity there is perhaps this background of reality. We can believe, consistently with being advocates, that we are performing in an ordered community a service than which there is no higher or more dignified—the obtaining of justice between subject and subject and between monarch and subject."—*L.J.*, 1937, *p.* 70.

The Long Vacation.—The autumn cessation from forensic strife, always known as the Long Vacation, has a long history be-

hind it, as well as a present satisfaction in the joys which it brings to the judges and to those in large practice at the Bar, although perhaps with less satisfaction to many a junior. At one time, too, its length was much more extended than it is now, it having apparently been considered good business to shut the courts for a very long period. Formerly it went on till November the 2nd, the morrow of All Souls, hence the last and farewell toast of the summer Assizes of "Cras Animarum", which became meaningless when, as someone said, sacrilegious hands were laid on the long vacation and the courts resumed work long before the dawn of the morrow of All Souls. What is the history of the terms and the vacations? Blackstone is not very generally read nowadays, more's the pity, but if the curious in such matters will turn to Book III of his Commentaries they will find much interesting information on the subject. There we read that the Christian magistrates, to distinguish themselves from the heathen who were extremely superstitious in the observance of their *dies fasti et nefasti,* went into a contrary extreme, and administered justice upon all days alike, till at length the Church interposed and exempted certain seasons "from being profaned by the tumult of forensic litigations". Thus we got the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the Long Vacation, between Mid-summer and Michælmas, which was allowed for the hay time and harvest. Sundays and certain other days were also included in the same prohibition.—*L.T.,* 1937, *p.* 108.

The Terms.—As Blackstone goes on to point out, when our legal constitution came to be settled, the commencement and duration of the law terms were fixed with an eye to the canonical prohibitions. By Edward the Confessor it was ordered that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of Holy Church was to be kept throughout the kingdom. So extravagant was, afterwards, the regard paid to these holy times that in the reign of Edward I no secular plea could be held, or any man sworn on the evangelists, in the time of Advent, Lent, Pentecost, harvest and vintage, the days of the great Litanies, and all solemn festivals. But it seems that the ecclesiastics were accommodating, for they sometimes granted dispensations that assizes might be taken in certain of these holy seasons. Still later a general dispensation was established by Parliament which, by a statute, declared that "forasmuch as it is great charity to do right unto all men at all times when need shall be . . . . assizes of novel *dissesin,* it was provided that *mort d'ancestor* and *darrein presentment* should be taken in Advent, Septuagesima,

and Lent, even as well as inquests may be taken; and that at the special request of the King to the Bishops". The portions of time not included in the prohibited seasons were divided into four, and named according to the festival or saint's day that immediately preceded their commencement—Hilary, Easter, Trinity, and St. Michæl, which are still familiar to us as designating the sittings.—*L.T.*, 1937, *p.* 109.

Sittings after Terms.—As the late Sir John Hollams in his interesting "Jottings of an old Solicitor," truly said, almost everything connected with the law courts and the administration of the law has completely changed; it certainly had within his extended memory. Thus, he tells us that the sittings for the trial of jury cases after term were limited to twenty-four days after Hilary, Trinity and Michælmas terms, and six days after Easter term. No London or Middlesex special jury cases could be tried except in the limited time allowed after Hilary, Trinity and Michælmas terms, but common jury cases were taken in term time. When Sir John began his life professionally the courts were sufficiently robust to begin tht jury list at 9-30 in the morning, but in those days there were no long cases, or very few, and Sir John added that owing to the strict rules of evidence then prevailing when neither of the parties were competent witnesses, the plaintiff in many instances was unable to prove a *prima facie* case and consequently was nonsuited. As Mr. Theobald Mathew reminded us recently in his study of *Bardell* v. *Pickwick,* Mr. Jackson, of the firm of Dodson and Fogg, intimated when serving the supœnas on the Pickwickians at the George and Vulture, that the trial would "come on in the sittens after Term, Fourteenth of Febooary, we expect"; and it came on as we all know at the Guildhall.—*L.T.*, 1937, *p.* 109.

BOOK REVIEWS.

THE LAW OF PAKKI AND KATCHI ADAT AND TEJI-MANDI CONTRACTS by Ramniklal R. Mody, B.A., LL.B., Solicitor, High Court, Bombay, second edition, 1937. Published by Messrs. N. M. Tirupati & Co., Bombay. Price Rs. 3.

This book deals with the nature and incidents of Pakka Adatya, Katcha Adatya and Tej-Mandi transactions which are dealt with in Parts I, II and III respectively of the Book. These transactions are largely, if not solely, prevalent in the Bombay Presidency as a result of the forward business in the Bombay market. The learned author points out that the nature of the first two came up before the Bombay High Court only in 1905. The legal incidents of a Pakka Adatya transaction is somewhat complicated. The relation of a Pakka Adatya to the constituent is, in some respects, analogous to

that of an agent to the principal and in some other respects resembles that of a principal to a principal. On the other hand, the Katcha Adatya stands to the constituent in the position of only an agent. The Tej-Mandi transactions were till recently considered to be of a gambling nature, though recently it has been held that there are not always of that nature. The book under review explains these very complicated transactions and their legal incidents with reference to all the decided cases on the points and it will be found useful by those who want to engage in them and to lawyers who may have to deal with them in their practice.

COMMENTARIES ON THE PROVINCIAL INSOLVENCY ACT (V OF 1920) by Ram Lal Anand, B.A., LL.B., Advocate, High Court, Lahore and Ganesh Datta, B.A., M.R.A.C., Barrister-at-Law and Advocate, High Court, Lahore, 1937. Published by University Book Agency, Lahore. Price Rs. 6.

This is a full and up-to-date commentary on the Provincial Insolvency Act. It is well known that decisions under this Act are multiplying and an up-to-date commentary from the pen of one who as an Official Receiver had to do with the practical working of the Act will be found useful, as the difficulties arising in practice will be found solved. The decisions under the various provisions have been noticed and considered in their appropriate places in the book. To add to the utility of the book, the learned author has given the rules framed under the Act by the Allahabad, Bombay, Calcutta and the Madras High Courts. There are also additional model forms and pleadings given at the end of the book. We commend this book for the use of lawyers and judges and others having to deal with the enactment.

PRINCIPLES OF EQUITY by G. A. Vaidya, B.A., LL.B., Advocate, High Court, Bombay, 1937. Published by Karnatak Publishing House, Bombay. Price Rs. 4.

This is a hand-book elucidating the principles of equity intended mainly for law students. The learned author has in the book followed the classification of the subjects adopted by Snell in his well-known book. The topics are dealt with in various chapters with great lucidity intelligible to persons having no previous acquaintance with the subjects. In all appropriate places the learned author has pointed out the extent to which the equitable principles have been adopted in this country by legislation or otherwise. We have no doubt that the book will be found very useful to the students and beginners in law.

CONSTITUTIONAL LAW by G. N. Joshi, M.A., LL.B., 1937. Published by Karnatak Publishing House, Bombay. Price Rs. 3-8-0.

In this book the learned author who is himself a Professor of Constitutional Law for the Government Law College, Bombay, expounds the principles of Constitutional Law in a manner easily intelligible to the Indian students preparing for law examinations. He has collected his materials for the book from the well-known treatises on the subject and the book under review supplies the need of a text book for the students of the Indian Universities. The book is divided into five parts, the first is the introduction, the second part deals with the general principles of the English constitution, the third the structure of the principal organs of the Government, the fourth with the liberties of the subject and the fifth with the British Empire. We are inclined to agree with the Honourable Mr. Justice Wadia in his observation about the book that the Indian Constitution at the present time deserves to be allotted a much larger space in the book than what the learned author has allotted to it. We have every hope that the book will be found useful by those to whom primarily intended.

INDIAN COMPANIES LAW AND PRACTICE (including Forms and Precedents) by Sohrab R. Davar, Barrister-at-Law and Advocate, with a Foreword by the Honourable Mr. Justice H. J. Kania, B.A., LL.B., High Court of Judicature, Bombay, 1937. Published by Messrs. Butterworth & Co. (India), Ltd. Price Rs. 24 (two volumes).

Since the recent amendment of the Indian Companies Act, several commentaries of the Indian Companies Act have appeared which from the point of view of the lawyer are of great use. Davar's treatise on the Indian Company Law approaches the subject from the point of view of businessmen and company promoters without at the same time sacrificing his usefulness to lawyers as a legal text book. It is not written as a commentary on the Act but the subject is divided in nineteen chapters, each chapter dealing with a distinct aspect of Company Law. The book is one of the most comprehensive treatises on Indian Company Law in two stout volumes of over one thousand pages each. All the decisions on the subject have been noticed in their proper places. The value of the work is considerably enhanced by the various forms and precedents which the learned author has collected from various sources and presented to the reader. The learned author has the additional advantage of appreciating the difficulties in learning this branch of the law from his great experience of teaching Company Law in the College of Commerce conducted by him. We have no doubt that this work will find a prominent place in the library of company lawyers, company promoters and businessmen.

THE FEDERAL LAW JOURNAL OF INDIA, edited by A. N. Aiyar, Advocate, High Court, Madras. Published by Company Law Institute, Thiagarayanagar, Teynampet.

The establishment of a Federal Court in India naturally calls for the decisions of that tribunal to be reported in legal journals, as they are pronounced by the highest court in the land and are therefore of very great authority. Mr. A. N. Aiyar who is well-known to lawyers in this country is doing a distinct service by publishing the Federal Law Journal of India, the first issue of which has been placed in our hands. The learned editor proposes to give in this journal not only the reports of the decisions and proceedings of the Federal Court of India but the decisions of the Privy Council and the decisions of the High Courts and other superior Courts in India dealing with questions arising on the Indian Constitution. He will also give in the pages of the journal the Statutes of the Federal Legislature, the Parliamentary measures affecting India, the Orders in Council and the Rules and Regulations under the Government of India Act. It is needless to say that there will be the editorial notes on all these matters by the learned editor. We feel sure that the publication will be found of great use to lawyers and judges on constitutional points and look forward to a prosperous career for the journal.

SUPPLEMENT to S. Ranganatha Aiyar's HAND BOOK OF CRIMINAL PROCEDURE, 1937 Edn. Price Re. 1.

Mr. Ranganatha Aiyar's Hand Book of Criminal Procedure represents the lectures he delivered to the apprentices-at-law under the auspices of the Bar Council, Madras. The present brings that work up-to-date in the matter of case-law as well as in the matter of textual amendments of the Criminal Procedure Act necessitated by the recent Government of India Act. The book will be found useful not only by the apprentices for whose benefit it is mainly intended but also by practitioners who will find in it in effect a sort of a supplement to his bigger book on the Criminal Procedure Code.

[END OF VOL. II.]

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NOTES OF RECENT CASES.

Venkataramana Rao, J. S. A. No. 1169 of 1932.
29th July, 1937.

Limitation Act (IX of 1908), S. 10—'Alienated land' within Madras Regulation 31 of 1902—Pre-settlement Mokhasa in a Zemindari—Attachment of, by Zemindar for arrears of rent under S. 34, cl. (6) of Madras Regulation 28 of 1902—Possession taken by Zamindar —If an "express trustee" within the meaning of S. 10, Limitation Act—Subsequent sale of Zamindari for arrears of peishcush—Government getting into possession—Writing off of arrears —Resumption of Mokhasa—Return of Zamindari to Zamindar—Regrant of Mokhasa to him—Effect of—Undisturbed possession by Zamindar for over 12 years, with knowledge and acquiescence of Mokhasadars—Adverse possession.

A suit was brought by the plaintiff for possession of a 1/36th share in a Mokhasa *T* situate within *N* Zemindari. The Zamindars (defendants 1 and 2) and their predecessors got into possession of the *T* Mokhasa about 75 years ago and ever since have been in open, continuous and undisturbed possession and enjoying the properties in their own right. The village *T* was a pre-settlement Mokhasa and subject to a Kattubadi at the permanent settlement. It is therefore an "alienated land" within the meaning of the preamble to Madras Regulation 31 of 1902 and therefore the right of resumption inhered in Government by virtue of cl. (4) of Regulation 25 of 1902. The Zemindari was now and then being managed by the Court of Wards. In 1831, the suit Mokhasa was attached for arrears of rent under S. 34, cl. (6) of Madras Regulation 28 of 1902. The Zemindari itself was sold for arrears of peishcush in 1843 and regranted in 1845. Again in 1851 the Zemindari was sold for peishcush and possession taken by Government and it continued so till 1860. The Government then resumed the Mokhasa in 1856 and incorporated it with Government land but still the obligation to pay the Kattubadi remained. The Government as owners of the Zemindari wrote off the arrears.

But when the sale of the Zemin was set aside, the Government regranted the Mokhasa to the Zemindar. From 1860 the Zemindar was holding the Mokhasa in his own right free from and discharged of all claims of the Mokhasa. It was found that the resumption proceedings were with the knowledge of the Mokhasadars and that they acquiesced in the same and abandoned their right to the Mokhasa. In 1884 an attempt to recover the Mokhasa failed. In this suit it was contended that the Zamindar held the Mokhasa as an express trustee by virtue of attachment and that therefore the suit was not barred.

Held, that when property is attached under S. 34, cl. (6) of the Madras Regulation 28 of 1902 there is no transfer of property nor is there a right to call for a transfer of property. The only right is to manage the property until the amount due is discharged. No right of disposal over property is given. But for this there is no right to landlord to enter on the land. The possession of the tenant is therefore displaced by statute and it is not by virtue of any confidence reposed by the Mokhasadar in the Zemindar that possession is taken but in opposition to and in derogation of his rights as owner to remain in possession. The relationship thus created by attachment can in no sense be one of trustee and *cestui que trust*.

I.L.R. 8 Bom. 585 and I.L.R. 39 Bom. 572, distinguished.

Assuming that by virtue of the statutory obligation to account for management and to deliver possession of the land a constructive trust can be raised, there has been open disclaimer of the title of the Mokhasadars and a renunciation of the character of possession which will set the statute running from the date of disclaimer or renunciation. The result of the Government buying the Zemindari, writing off the arrears and regranting the Zemin, etc., to the Zemindar was to put an end to the relationship created by the 1831 attachment and therefore from 1860 onwards the Zemindar held the Mokhasa in his own right free and discharged of all claims of the Mokhasa.

I. L. R. 34 Mad. 257, distinguished as here there has been a complete divestment of any fiduciary character, assuming the Zemindar held such before.

G. Lakshmanna and *G. Chandrasekara Sastri* for Appellant.

P. Somasundaram, Y. Govindarajulu, P. V. Rajamannar, K. Subba Rao and *V. Suryanarayana* for Respondents.

S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 2 of 1937.
22nd July, 1937.

Civil Procedure Code, S. 92—Suit by a trustee against co-trustee for account—If sanction necessary.

The suit temple is a Hindu temple belonging to a sect of the Hindus. The plaintiffs brought the suit as trustees against their co-trustees for an account and other reliefs. At a meeting of the community the plaintiffs and defendants were elected as trustees for the purpose of collecting subscriptions, for the improvement of the temple, for the performance of the rites therein and for the conduct of festivals and other cognate matters, with power to spend the collections on these objects. It was alleged that the defendants 1 and 2 alone were acting as the managing trustees and were in charge of all the monies, that large sums of money were collected and spent by them for their own purposes. It was conceded that this was a public trust and the question was if the suit, without the sanction of the Advocate-General under S. 92, Civil Procedure Code, was maintainable and if I.L.R. 45 Mad. 113 is still good law after I.L.R. 55 Cal. 519 and I.L.R. 58 Mad. 988.

Held, that I.L.R. 45 Mad. 113 is still good law and there is nothing in I.L.R. 55 Cal. 519 or I.L.R. 58 Mad. 988 against it. Sub-S. (2) of S. 92, though expressed in general terms, must be read along with sub-S. (1) and it follows on such reading that it is not every suit claiming any of the reliefs specified in sub-S. (1) that should be brought with the consent of the Advocate-General, but only those suits which besides claiming any of those reliefs are brought by individuals as representatives of the general public.

K. V. Sesha Aiyangar and *R. Gnanasambandan* for Appellant.

K. Narasimha Aiyar, T. V. Subramania Aiyar and *T. R. Srinivasa Aiyangar* for Respondents.

S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 63 of 1936.
29th July, 1937.

Indian Christian Marriage Act (XV of 1872)—Marriage with a girl above 18 but below 21 before a Registrar—False declaration by the husband that the girl was 22 and living within the Registrar's jurisdiction—Marriage solemnised—Certificate of marriage issued—Marriage if void.

The marriage of the respondent, who was then a major, with an Indian Christian girl, aged 18½ years at the time, was solemnised

before the Marriage Registrar of St. Thomas Mount. The respondent gave notice of the marriage to the Registrar at St. Thomas Mount falsely declaring before him (*i*) that the girl was 22 years old then and (*ii*) that both the parties resided at St. Thomas Mount. The respondent took the oath required by S. 42 and made the two false declarations. As the result of the false declaration made by the respondent, he obtained a certificate which entitled him and the girl to be married, there being no statement in it showing any lawful impediment to the marriage. The father of the girl and the girl filed a suit for a declaration that the marriage was a nullity because of the false declarations.

Held, that this argument ignores the provisions of Ss. 4 and 5 and would read into Part V of the Act provisions which are not there. The Registrar who solemnised the marriage was authorised by law to solemnise it, and having been solemnised by an official authorised in this respect it cannot be declared to be void under S. 4. By reason of the false declarations, the husband has rendered himself liable to punishment under S. 66 but that does not render the marriage illegal. The parties were in a position to contract a lawful marriage and such a marriage was solemnised by the Registrar in accordance with the provisions of the Act and as such it is not rendered void merely by this declaration.

T. R. Venkatarama Sastriar and *T. Krishnaraja Naicker* for Appellant.

T. A. Srinivasan for Respondent.

S. V. V.

Newsam, J. C. R. P. No. 610 of 1936.
30th July, 1937.

Court-fee—Pledge of jewels—Suit by pledgor for recovery of jewels or their value—Valuation for purposes of court-fee and jurisdiction.

Where a pledgor of jewels sued for recovery of the pledged jewels or their equivalent money value and valued the suit for purposes of court-fee and jurisdiction on the amount payable by him under the pledge,

Held, that the valuation adopted by the plaintiff was proper.

S. Venkatesa Aiyangar for Petitioner.

M. S. Venkatarama Aiyar and *C. K. Venkatanarasimhan* for Respondents.

B. V. V.

Venkatasubba Rao and Newsam, JJ. Appeal No. 290 of 1935.
3rd August, 1937.

Land Acquisition Act—Rule of 20 year's purchase—If a rigid rule or can be varied.

There is no uniform or rigid principle in regard to the number of years purchase to fix the capital value of the land acquired by Government under the Land Acquisition Act. It will vary according to the interest paid on gilt-edged securities at the time, etc.

11 C.W.N. 878; I.L.R. 16 Mad. 369 and I.L.R. 10 Cal. 774, referred to.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) for Appellant.

V. Govindarajachari for Respondent.

S. V. V.

Venkatasubba Rao and Newsam, JJ. Appeal No. 228 of 1932.
3rd August, 1937.

Provincial Insolvency Act—Composition scheme—Scheme providing for insolvent's properties being sold to two sureties on condition of their paying 5 annas in the rupee—Creditors paid—Official Assignee conveying 'right, title and interest of insolvent' in properties—If it conveys also son's undivided interest therein.

In I.P. No. 2 of 1927 (Rangoon High Court) a firm of Nattukottai Chettiars, of which the father of each defendant was a partner, was adjudicated insolvent. On 17th January, 1928, a composition scheme was approved by the Court by an order which stated that the Official Assignee was to be paid his expenses and commission, and that the creditors agreed to receive and were guaranteed payment of five annas in the rupee by two Chettiar firms, who were described as sureties but who were to be in reality the purchasers of the entire assets of the insolvent firm. In pursuance of this scheme the purchasers of the assets paid Rs. 52,173-9-9 privately to certain creditors and Rs. 55,450-0-0 to the Official Assignee for distribution to the remaining creditors. These payments amounted to paying five annas in the rupee of the insolvent firm's liabilities. Thereupon the Official Assignee transferred by deed all the assets of the insolvents described in the schedule "with all the right, title and interest of the said insolvents therein" to the purchasers. The surety purchasers then sold the suit house to plaintiff for Rs. 75,000 and the undivided sons of the insolvent objected, contending that their shares could not be taken under that.

Held, that as there was no question that the debts were immoral or illegal, the pious obligation of the son to pay the father's debts rendered the sons also liable and in exercise of that right the father and the Official Assignee could have conveyed the

son's interests. The word 'asset' of the father and 'right, title and interest' in the deed had the effect of conveying also the shares of the sons.

V. Ramaswamy Aiyar for Appellant.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent.

S. V. V.

The Chief Justice. C. R. P. No. 1169 of 1935.
6th August 1937.

Madras District Municipalities Act (V of 1920)—Profession Tax—S. 93 and r. 17 of Schedule IV—Meaning of "holding office or appointment" and "place of employment"—Difference in the language of S. 93 of the present Act and the corresponding section of the old Act—Effect of leave preparatory to retirement and prefixing summer vacation of Court to leave—Fundamental Rules.

M was the District and Sessions Judge of Kistna with headquarters at Masulipatam from 1st April, 1931, till 4th May, 1931. The District Court was closed for the summer vacation fron 4th May, 1931, till 6th July, 1931. *M* was due to retire from service on 31st July, 1931. He applied for and obtained leave from 6th July, to 30th July, 1931, preparatory to retirement with permission to prefix the summer vacation to his leave, and left Masulipatam for good on 4th May, 1931. *M* spent the vacation at Kodaikanal and other places. The Sessions Judge, West Godavari, in addition to his duties was appointed Additional Sessions Judge, Kistna, during the summer vacation. During the summer vacation *M* did some administrative work at Kodaikanal in connection with the office of the District Court, Kistna.

Held, (1) that after 4th May, 1931, *M* did not hold the appointment of District and Sessions Judge of Kistna within the Municipality of Masulipatam nor was Masulipatam the place of *M's* employment within the meaning of S. 93 and r. 17 of Schedule IV of the District Municipalities Act;

(2) that the fact that *M* did some administrative work at Kodaikanal would not render him liable to pay the professional tax;

(3) that the Madras District Municipalities Act being a taxing statute must be strictly construed; and

(4) that *M* was not liable to pay profession tax for the 1st half year of 1931-32 as he did not hold the appointment within the Municipality of Masulipatam for the minimum period of 60 days.

I.L.R. 17 Mad. 453, I.L.R. 22 Mad. 145 and I.L.R. 38 Mad. 879, considered.

R. Swaminatha Aiyar for Petitioner.

V. Govindarajachari for Respondent.

S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 39 of 1936.
28th July, 1937.

Will—Proof of—Rule in Tyrrell *v.* Painton—*When applicable —Surrounding circumstances not exciting suspicion—If rule applies, merely because of some unnaturalness in the legacies.*

The testator, a resident of Madras, died in a village outside Madras on 17th March, 1934, leaving a will dated 19th January, 1934. He made provisions therein for performance of certain ceremonies and then provided that his wife should be given Rs. 12 per mensem and another Rs. 12 per annum for clothing and that the balance should go to his younger brother. He appointed three executors. The wife contested the will pleading that the testator was not in full possession of his mental faculties at the time of the execution of the will and that he was influenced by his brother. The testator was taken ill in October, 1933. He was then aged 65. He consulted an advocate who prepared a draft according to testator's intentions and handed it over to the testator on 23rd October. Nothing more was done till January, when about the 19th his health was affected again. The testator thereupon instructed his brother's son's tutor to write up the will as per the advocate's draft and then signed and registered it in person at the registrar's office. Then he left for his village and lived there till his death. In between January and March the testator had written letters to his brothers referring to the will. It was contended that the case fell under the rule in *Tyrrell* v. *Painton,* (1894) Probate 151 inasmuch as the wife was given a very small maintenance.

Held, that as pointed out in I.L.R. 27 Cal. 521 and I.L.R. 38 Cal. 355 the rule requiring proof that the testator actually knew and approved of the contents of the will does not apply unless the surrounding circumstances excite suspicion. Merely showing that there was motive and opportunity for the exercise of undue influence and that some of them benefited by the will to the detriment of other relations of equal or nearer degree is not enough to establish undue influence. They might excite suspicion and lead the Court to scrutinise the evidence carefully, but in order to set aside the will, there must be clear evidence that the undue influence was in fact exercised or that the illness of the testator affected his mental faculties as to make him unequal to the task of disposing off of his property.

T. C. A. Bashyam and *T. C. A. Thirumalachariar* for Appellants.

V. Radhakrishnayya and *V. Sambandam Chetti* for Respondents.

S. V. V.
N R C

Varadachariar, J. C. R. P. No. 1165 of 1935.
6th August, 1937.

Hindu Religious Endowments Act (II of 1927), S. 84—Decision by Board that a temple is a public temple—Suit to set aside the decision—No evidence before Board but only affidavits—If affidavits evidence before Court—Meaning of 'Public.'

In deciding whether a temple is a public temple, the reference to the 'public' can only be such public as can worship in the temple and available in the locality in question. Where in a village Hindu inhabitants are very few, public can only mean the Hindu public in the locality.

The Board acted on the affidavits filed during the proceedings before it in proof of the practice of outsiders to come and worship at the temple. The Court in the suit acted upon the affidavits.

Held, that it is true that the proceedings before the District Court under S. 84 have been held not to be merely in the nature of an appeal so as to preclude the parties from leading fresh evidence before the Court, but that is very different from saying that the proceedings before the Court are so wholly *de novo* that the materials placed before the Board should not be regarded as part of the record of the enquiry. The fact that the deponents of affidavits were not examined before Court may be an important circumstance to be borne in mind in appraising the value of such evidence, but it is too much to say that the materials that are before the Board should be treated as not forming part of the record of the enquiry before the Court.

V. Rangachari for Petitioner.
K. Subba Rao for Respondent.
S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 73 of 1936.
9th August, 1937.

Presidency Towns Insolvency Act (II of 1909), S. 9, cl. (g)—Act of insolvency—Agreement between debtor and creditor that default in payment of his debt should be treated as notice of suspension of payment—If estops debtor from objecting to adjudication—If such non-payment amounts to notice of suspension of payment.

In 1935 one *M* was indebted to one *R* in a sum of over Rs. 2,000 on a promissory note and a sum of Rs. 317 odd under a decree. In execution of the decree, *R* attached a house belonging to *M*. The attachment continued for more than 21 days and

basing on that a petition was filed by *R* in February, 1936, to adjudicate *M* an insolvent. As a result of an arrangement between the parties, made outside Court, the petition was withdrawn on *M* executing a mortgage deed undertaking thereby to pay a sum of Rs. 400 by 15th June, 1936, Rs. 500 by 15th December, 1936, and the balance in two equal instalments within one year thereafter. It was also provided in the document that "in case of default of any one payment as aforesaid the mortgagee shall be at liberty to take *further* proceedings in insolvency and the mortgagor shall not raise any objection thereto and this act of default itself will then be treated as an act of insolvency on the part of the mortgagor as amounting to a suspension of payment within the meaning of the Act". *M* failed to pay even the first instalment and then *R* filed this fresh petition in August, 1936, for adjudicating *M* as an insolvent alleging this default as one of the acts of insolvency.

Wadsworth, J., held that *M* is estopped by reason of the execution of the mortgage deed . . . . from contending that his subsequent failure to pay Rs. 400 on or before 15th July, 1936, does not amount to a notice to his creditor that he has suspended payment of his debts and has committed an act of insolvency.

Held, on appeal, that the law of estoppel does not operate and cannot operate to prevent the provisions of the Insolvency Act having effect. It will be an act of insolvency if a debtor gives notice to any of his creditors that he has or is about to suspend payment of his debts generally and not of payment of any particular debt. The fact that the insolvent and his creditor agreed that default in payment of an instalment under the mortgage should be treated as an act of insolvency does not make it incumbent upon the Court to regard it as an act of insolvency. The agreement cannot be deemed to constitute the non-payment an act of insolvency.

Satagopa Srinivasaraghavan for Appellant.

E. R. Krishnan for Respondent.

S. V. V.

Venkatasubba Rao and Newsam, JJ. A. S. No. 267 of 1931.
10th August, 1937.

Hindu Religious Endowments Act (II of 1927), S. 73—Suit by worshippers for a declaration that certain persons are not entitled to emoluments as of right—If maintainable.

A suit was brought by certain worshippers of a temple with the consent obtained of the Board of Commissioners, to get a declaration in respect of a class of persons who were claiming a fixed share of the *prasadams* offered to the deity. It was found

that they were not in enjoyment of the allowances for such period as would serve to raise a presumption of a legal origin and that the emoluments were not attached to the performance of any religious office, service or duty in the temple. The trustees, the members of the Devastanam Committee, and the emolument claimants were made parties to the suit. The plaintiffs did not want to fetter the discretion of the trustees in doling out the offerings even to them as a matter of charity, if they felt the persons to be deserving but the suit aimed at getting a declaration that they are not *as of right entitled* to receive a fixed share of the *prasadams* and an injunction restraining the trustees from allowing such a claim by making a cash payment to them as such or in lieu of any so-called vested interest in the offerings. The question was if the suit was maintainable under S. 73 of Act II of 1927.

Held, that the present suit is entirely outside the scope of S. 73. The suit is not in respect of the administration or management of the temple. The right of the trustees or of the committee to make charitable doles is not questioned. What the plaintiffs ask is to have their right declared as against certain third parties, that is, strangers to the trust. Such a suit does not come under S. 73 and cannot be said to be barred by it. The further relief that trustees and committee shall be restrained from giving and the emolument claimants from receiving, is merely ancillary to and consequential upon the declaration.

T. M. Krishnaswami Aiyar and *V. N. Venkatavaradachari* for Appellants.

K. R. Rangaswami Aiyangar for Respondents.

S. V. V.

Pandrang Row and Venkataramana Rao, JJ. Appeal No. 391 of 1931.
12th August, 1937.

Hindu Law—Inheritance—Father's half sister's son and mother's brother's son—Preferential heir.

Under Hindu Law as between a father's step sister's son and a mother's brother's son, the father's step sister's son is the preferential heir.

I.L.R. 59 Cal. 575, followed.

P. S. Raghavarama Sastri for Appellant.

K. Bashyam, V. R. Venugopalan and *Kasturi Seshagiri Rao*, for Respondent.

S. V. V.

The Chief Justice and Varadachariar, J. C. C. C. A. No. 40 of 1935.
3rd August, 1937.

Res judicata—*Suit on foot of a document being invalid—Later suit on foot that document valid but entitled to damages as title under it is lost—If* res judicata– *Civil Procedure Code, S. 80 —Official Assignee—If a public officer—Suit against Official Assignee as representing an estate—If notice under S. 80 necessary.*

One *D* was the plaintiff's father and the brother of one *K*. The said *K's* wife was one *J*. A piece of immovable property was purchased in the joint names of *D* and *J* for Rs. 200. *D* having died, *V* (plaintiff) filed a suit O. S. No. 437 of 1937 for partition and possession of his half share. *J* defended the suit claiming that her husband was the purchaser. The suit was compromised. Under this the plaintiff was to pay Rs. 700 to *J* as for her interest. But prior thereto *J* had mortgaged this property to one *D A* and it was not known to the plaintiff. The plaintiff paid Rs. 700 in June, 1928, but as he had by then discovered the mortgage, he applied for the money being kept in Court without being paid to *J* and got an order to that effect. Then the plaintiff filed O. S. No. 424 of 1929 against *J* and *D A* for a declaration that the mortgage was invalid. The Court held in August, 1930, that the mortgage was good up to *J's* share and gave a decree to the plaintiff subject to the mortgage. An appeal against it by *D A* was dismissed in September, 1932. Pending appeal *J* was adjudicated on 27th April, 1931. On 9th April, 1931, the plaintiff had withdrawn the Rs. 700 from Court. The Official Assignee claimed this sum back and Rs. 738-8-0 was paid on a deed of release executed by the Official Assignee in favour of plaintiff in respect of *J's* half share in the property. In execution of *D A's* mortgage decree, the half share was purchased by a third party on 6th March, 1933. As a result therefore the plaintiff got nothing for his Rs. 738-8-0 because the property had got into a third party's hands in execution sale. Thereupon plaintiff filed O.S. No. 406 of 1932 against the Official Assignee on the basis that the release deed had no legal effect. But it was dismissed on the ground that the payment was made by the plaintiff voluntarily. Thereupon the plaintiff filed this suit on the basis that the Official Assignee granted to him a good title which has been lost and that therefore the Official Assignee was liable in damages.

Held, that O. S. No. 406 of 1932 did not operate as *res judicata* as it was filed on the basis that the deed of release was of no legal effect but this is on a different cause of action that the document is a valid one and that the plaintiff is entitled to damages for breach of a covenant contained in it.

N R C

S. 80, Civil Procedure Code does not bar the suit either. The Official Assignee is a 'public officer' within the meaning of the section and S. 80 covers both cases in contract and in tort. But the Official Assignee in executing the deed of release was not doing an act in his official capacity and further the suit is not against him in respect of any act done by him in that capacity. The claim is not against him personally but against him as representing the estate of *J.*

I.L.R. 61 Cal. 470, followed.

K. S. Krishnaswami Aiyangar and *N. C. Vijiaraghavachariar* for Appellant.

V. Ramaswami Aiyar for Respondent.

S.V.V.

Pandrang Row and Venkataramana Rao, JJ.
4th August, 1937.

Appeal No. 304 of 1934.

Mortgage—Mortgage by members of a Mahomedan family—No attesting witness called—Evidence Act, S. 70—'Admission', meaning of—Proof of mortgage.

In a suit on a security bond alleged to have been executed by members of a Mahomedan family consisting of defendant 1 and his brothers defendants 2 to 4 and his sister the 5th defendant, defendants 3 and 4 pleaded that when they signed the bond there were no signatures of attesting witnesses and there were also no alterations and interlineations as were now found on the bond. The lower Court had passed a decree though no attesting witness was called to prove execution and there was also no evidence of attestation as required by law.

Held, that the plaintiff was bound to adduce such evidence and there was no admission of execution within the meaning of S. 70 (Evidence Act) which must be understood to mean "due execution as required by law".

I.L.R. 5 Pat. 58, followed.

An admission within the meaning of that section (S. 70) must be one in the pleadings or in the course of the trial of the suit and cannot include an admission of execution alleged to have been made in another document.

I.L.R. 27 Cal. 190, followed.

4 P.L.J. 511, not approved.

Further the decree against the 5th defendant cannot be sustained as there was no evidence of the bond having been read and explained to her.

S. Ramaswami Aiyar for Appellants.

M. S. Vaidyanatha Aiyar for Respondent.

S. V. V.

The Chief Justice and Varadachariar, J. O.S.A. Nos. 26, 27, 28 of 1937.

12th August, 1937.

Company—Directors—New company started—One director left in charge—Misappropriation by—Extent of liability of other directors—Companies Act, S. 103—Certificate under, obtained by false declaration of a director—Facts known to other directors—Liable for liabilities of the company.

The company was registered on 11th May, 1933, for the purpose of doing all kinds of banking business. On 7th September, 1933, the certificate under S. 103 of the Companies Act was obtained for commencing business. In February, 1934, the business ceased to be carried on and on 6th April, 1934, a winding up order was made. Respondents 1 to 8 were directors appointed under the Memorandum of Association. The 9th respondent was the promoter and he arranged that he should be appointed legal adviser to the company and the "advisory director." In or before 1931 he was carrying on a business which had failed. He became an insolvent and was an undischarged insolvent at the time this company was started and has since remained so. The entire business of the company from its incorporation until August, 1934, was entirely in his hands. All moneys paid to the company were received by him and he had entire control over them. Included in these monies were some amounts paid to him by way of security by those who became employees of the company. The respondents (directors) took little or no part at this period in the company's activities. They exercised no control or supervision over the 9th respondent and left him solely in charge. Before the company was incorporated a draft agreement had been prepared under which the company was to advance to him Rs. 10,000 on the security of his interest in the assets of his earlier business and a life policy of Rs. 10,C00. It was arranged that of this Rs. 5,000 should be paid to redeem his assets from the Official Assignee. A fair agreement was executed after the company was incorporated. The Official Liquidator claimed from the other directors (*i*) the sums misappropriated by the 9th respondent from the security deposits and (*ii*) a sum representing the liabilities incurred by the company. Article 95 of the Articles of Association indemnified the Directors for anything done by them except where loss has been incurred as the result of wilful neglect or wilful default on their part. Respondents had no reason to suspect the integrity of the 9th respondent, though he was an undischarged insolvent. There was no reason for them to suspect that the 9th respondent would utilise the security deposits for his own use.

Held, that in view of the indemnity clause (Art. 95) not only must a director, to become liable, be guilty of negligence, but he

must know that he is committing a breach of duty or is recklessly careless in the matter. The respondents were justified in trusting the chairman and 9th respondent to deal properly with the employees.

(1925) 1 Ch. 427, followed.

A director is justified in trusting the officials of the company, so long as he is acting honestly.

(1899) 2 Ch. 629 and (1901) A.C. 477, applied.

The second head of claim stands on a different footing. The minimum subscription had been subscribed, but the amounts due on them by the directors had not all been paid and the certificate under S. 103 permitting the company to commence business was obtained by a false declaration made by the 9th respondent. The respondents knew of the obtaining of the certificate. They therefore wilfully permitted the company to carry on business on the strength of that certificate. In any event they must be deemed to know the law and that the business cannot be begun under S. 103. Therefore as for item (2) the directors were guilty of wilful negligence and liable to pay under S. 235. Though the respondents might have acted honestly, it cannot be said they acted reasonably and therefore they cannot be relieved from the consequences of their wilful negligence under S. 281.

K. Krishnaswami Aiyangar, E. Antony Lobo, S. R. Subramaniam, K. C. Subramaniam Chettiar, O. Rajavelu Chetty and *A. Ramaswami* for Appellants.

A. Westmorland Wood for Respondents.

S. V. V.

The Chief Justice and Varadachariar, J. C. C. C. A. No. 1 of 1936.

19th August, 1937.

Banking—Rule of bank empowering it to close an account without notice—If illegal or opposed to public policy.

A rule in the Bank read "The bank reserves to itself the right to close any account without any reference to the depositor if in the opinion of the bank it is not desirable to keep such account for any reason whatsoever".

Held, that as it is not in violation of a statutory obligation, there is no reason why parties should not contract themselves in this manner if they chose to do so. The rule is in the nature of a contract entered into between the parties. There is nothing immoral or opposed to public policy.

C. Chellam Aiyangar and *P.G. Raghavendra Rao* for Appellant.

Dr. V. K. John for Respondent.

S. V. V.

Burn and Lakshmana Rao, JJ. C. M. A. No. 325 of 1934.
6th August, 1937.

Limitation Act, Art. 182, cl. (5)—"Final order"—Meaning of —Order returning the petition—If a final order--Decree transferred to another Court—No certificate of non-satisfaction by the transferee Court—If Court which passed the decree competent to entertain an application for execution.

The first respondent was the decree-holder and he got a decree in the Sub-Court, Cocanada, for over Rs. 25,000. The decree stated that "the plaintiff do proceed against the first and second defendants (respondents 2 and 3) in the first instance and against the third defendant (appellant) in case the amount cannot be realised from 1 and 2 defendants". A sum of about Rs. 3,650 was realised by 1926 by execution against respondents 2 and 3 and two applications were filed by the decree-holder on 18th January, 1927, for transmission of decree to the District Munsifs of *K* and *R* places for simultaneous execution against 2 and 3 respondents. The applications were ordered on 20th January, 1927, and the decree copies were transmitted to *K* and *R* Courts. No steps were however taken there and an application for transmission to Sub-Court of *V* was filed again in Sub-Court, Cocanada, on 20th January, 1930. The execution application was returned for amendment on 9th October, 1930, for remedying certain defects but was not represented. The next execution application was filed on 27th September, 1932, for transmission to District Court of South Arcot for execution against all, the appellant and 2 and 3 respondents. It was argued that once a decree is transmitted to another Court for execution that Court alone can execute it and the Court which passed the decree is not competent to entertain an execution application for transmission or execution until the decree is returned with a certificate of non-satisfaction. In this case only the copy of the decree was returned without the certificate.

Held, that the Court which passed the decree is competent to entertain an application and transfer the decree to a third Court for execution.

A I.R. 1928 Mad. 493; I.L.R. 5 Rang. 397 and A.I.R. 1935 Lah. 465, followed.

63 M.L.J. 788 and I.L.R. 39 Mad. 640, distinguished.

But the application dated 20th January, 1930, cannot serve as a step in aid as there was no 'final order' passed on it. Final order need not be an order on the merits or a judicial determination of the matter involved in the application. But 'final order' implies that the proceeding has terminated so far as the Court passing the order is concerned. It cannot mean the last order in point of time irrespective of whether it terminates the proceeding or not.

N R C

Therefore an order granting further time for remedying certain defects does not terminate the proceeding and when the application is not represented, it cannot serve as a step-in-aid.

(1937) 1 M.L.J. 463, followed.

The Advocate-General (Sir A. Krishnaswami Aiyar), A. Satyanarayana and *K. Bashyam Aiyangar* for Appellant.

K. Subramaniam for Respondent.

S.V.V.

King, J. Crl. R. C. No. 746 of 1936.
12th August, 1937.

Madras Local Boards Act (XIV of 1920, as amended by Act XI of 1930), Ss. 193 and 627—Licence for working a rice mill—Renewal of licence refused—Mill continuing to work without licence—Conviction under S. 627—Conviction bad in law.

Before the Local Boards Act was amended, the Taluk Board, Vellore, had issued a notification under S. 193 of the Madras Local Boards Act notifying that among other places in the village '*V*' licence should be obtained before working a rice mill. One '*M*' obtained a licence in 1934 from the President of the Union Board of village '*V*'. The licence was renewed in 1935 but in 1936 the renewal of the licence was refused. And the rice mill continued to be worked without the licence. '*M*' was charged for an offence under S. 627 of the Madras Local Boards Act. He was convicted and fined by both the lower Courts.

Held, that in so far as after the amendment of 1930, the Village Panchayat Board of village '*V*' did not issue a fresh notification under S. 193 of the Madras Local Boards Act, '*M*' was not required to obtain any licence and therefore his conviction was bad in law. The transitory provision did not affect the question.

K. Bhashyam and *T. R. Srinivasan* for Petitioner.

The Public Prosecutor for the Crown.

A. C. Sampath Aiyangar for Complainant.

K. C.

Pandrang Row and Venkataramana Rao, JJ. Appeal Nos. 449 and 450 of 1931.
13th August, 1937.

Provincial Insolvency Act, S. 78 (2)—Exclusion of period for limitation—If period between the petition and annulment or adjudication order and the annulment.

The pronote sued on was executed on 8th January, 1920. A creditor of the executant filed a petition to adjudicate him insolvent on 7th November, 1922 and he was adjudicated insolvent on 21st

March, 1923. The adjudication was annulled on 5th April, 1928, and this suit on the pronote was filed on 23rd October, 1930, and to escape the bar of limitation, the plaintiff claimed that he was entitled to deduct the period from the date of the petition (I. P.) to the date of annulment under S. 78 (2).

Held, that under S. 78 (2) a creditor is entitled to deduct only the period from date of *adjudication* to the date of *annulment*. To apply the doctrine of relation back to a suit instituted before an order of adjudication is against the plain language of S. 28 (2). A suit can be filed without leave by a creditor before adjudication and the Court before which it is filed has jurisdiction to entertain it and pass a decree thereon. While so it is difficult to understand how an order passed *ex post facto* by another Court could render such a suit incompetent and a decree passed therein void.

I.L.R. 58 Mad. 1032, not followed.

A.I.R. 1933 Rang. 75, distinguished as *obiter*.

B. Sitarama Rao and *C. V. Subramania Aiyar* for Appellant.

B. Somayya and *Kasturi Seshagiri Rao* for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 1314 of 1936.

13th August, 1937.

Contract—Bailment—Contract Act, S. 149—Goods left in a room in defendant's house, but key of the room with plaintiff—If constitutes bailment and delivery.

The plaintiff arranged that certain jewels which she desired to be made should be got made by certain goldsmiths working in the defendant's house, because there was more convenient accommodation there. The plaintiff used to attend every day at the defendant's house during the time that the goldsmiths were at work. The defendant at the outset received two old jewels from the plaintiff for being melted into gold and being utilised for the making of the new jewels. That was melted and the gold delivered to the plaintiff. Every evening as soon as the goldsmiths' work for the day was over, the plaintiff used to receive the half-made jewel from the goldsmith, put them into a box which the defendant had given her for her use and put the box in a room in the defendant's house. The plaintiff had the key of the room with her. While there the jewels were lost,

Held, that the defendant cannot be regarded as a bailee in respect of the gold or the half-finished jewels. From the fact that in the first instance the old jewels were handed over to the defendant, the bailment thereby constituted does not continue for all time. But the gold was returned and afterwards the jewel came back to her possession every day.

The mere leaving of the box in a room in the defendant's house when the plaintiff herself took away the key of the room cannot be said to amount to delivery within the meaning of S. 149 of Contract Act.

V. Visvanatha Sastri for Petitioner.

N. S. Mani for *K. V. Sesha Aiyangar* for Respondent.

S. V. V.

Venkataramana Rao, J. S. A. No. 1313 of 1932.
13th August, 1937.

Court-Fees Act (VII of 1870)—Suit by sub-mortgagee—Original mortgagee also impleaded—Court-fee, if payable on amount due to sub-mortgagee or on the amount due under the original mortgage.

When a sub-mortgagee sues for sale of the property mortgaged to his mortgagor, that is, the original mortgagee, impleading the original mortgagor as a party thereto, the court-fee must be paid on the amount due and payable in respect of the original mortgage and not merely on the amount due to the sub-mortgagee. Ordinarily a sub-mortgagee's right, just like any other mortgagee is to enforce his mortgage and bring to sale the property mortgaged to him, that is, the interest of the mortgagee in the property mortgaged to the latter. But the law permits him to enforce sale of the said property under circumstances and conditions which would entitle the original mortgagee to bring the property to sale. To such a suit the original mortgagor should be made a party. When a mortgagee effects a mortgage of his mortgage interest he is creating a transfer of his right as mortgagee though not absolutely. Therefore when a sub-mortgagee sues for sale of the property he is enforcing the right of the original mortgagee. The amount claimed by him is the amount due under the said mortgage though as sub-mortgagee he is only entitled to a portion of the said amount. A decree is passed on the basis of the original mortgage and the principal, interest and costs payable are calculated as if a suit was instituted by the original mortgagee and on payment into Court of the said sum so declared due to the original mortgagee, the sub-mortgagee is at liberty to apply for the payment of the amount due to him. When he is asking for the sale of the property the amount claimed by him is, as assignee of his mortgagor, the amount due to the latter and it is only after getting a decree for the same, he gets a subsidiary relief for the payment of the amount due to him.

S. Narasimha Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

S. V. V.

Venkatasubba Rao and Newsam, JJ. A. S. No. 314 of 1931.
12th August, 1937.

Madras Hindu Religious Endowments Act (II of 1927), S. 73—Powers of the Court to frame scheme.

Under S. 73 of the Madras Hindu Religious Endowments Act the Court has no jurisdiction to frame a scheme. It can only appoint or remove a trustee or do such of the other acts as are mentioned in the section.

V. Radhakrishna Ayya and *S. V. Venugopalachari* for Appellant.

K. Rajah Aiyar and *S. Narasinga Rao* for Respondent.

K. C.

Burn and Abdur Rahman, JJ. S. A. No. 343 of 1933.
19th August, 1937.

Mahomedan Law—Sunnis—Deed of dower—No time specified therein as to when the dower was payable—Prompt or deferred—Presumption of law.

A Mahomedan wife brought a suit against her husband for recovery of Rs. 2,000 as dower specified in the deed of dower executed by him. The parties were both Hanafis. The deed was silent as to the time when it was payable. Venkataramana Rao, J., referred the case to a Bench for decision as there was a conflict in case-law in other Presidencies and it was also doubtful if I.L.R. 23 Mad. 371 laid down the law only for Shiahs as understood by Allahabad and Patna High Courts.

Held, that I. L. R. 23 Mad. 371 intended to lay down the law for all Mahomedans whether Shiahs or Sunnis, that the statement reported to have been made by counsel therein that the parties were Shiahs was a mistake, and that so far as this presidency is concerned there is no reason why the rule laid down in I.L.R. 23 Mad. 371, which is both workable and equitable should be disturbed after so many years. Even the Privy Council in 19 W.R. 315, though a case of Shiahs, intended to lay it down as law for Sunnis also.

Case-law discussed. Original texts examined.

K. Rajah Aiyar and *U. S. Ramaswami Aiyar* for Appellant.

S. Panchapakesa Sastri and *K. R. Krishnaswami* for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 369 of 1936.
20th August, 1937.

Civil Procedure Code (V of 1908), Ss. 38, 142, O. 21, r. 10—Decree transferred for execution as immovables situate therein—Transferee Court if can execute against person—No limitation in transfer order—Powers of transferee Court.

A decree was passed by the Small Cause Court, Trichinopoly. As one of the defendants had immovable property within the Munsiff's jurisdiction, the decree was transferred to him and as a result of the proceedings taken there, some of the immovable properties were sold and part of the decree amount realised in 1930. On 7th August, 1933, an application to arrest the second defendant was made to the District Munsiff. By that date no report was sent by the District Munsiff to the Small Cause Court so as to deprive the District Munsiff of power to execute the decree any longer. But the petition was returned saying " No legal representatives can be added here. Application may be made to Small Cause Court", as by that time the first defendant was dead. But as execution was sought only against the second defendant, the plaintiff pressed the petition but yet the District Munsiff returned it.

Held, that reading S. 38, O. 21, r. 10 and S. 42 of Civil Procedure Code, their effect is that unless in the order of transfer there is any express limitation of the purpose for which the transfer is made, assuming such limitation can control the provisions of the Code as to jurisdiction. There is no reason to limit the powers of the Court to which the decree is transferred for execution. Merely because decree was transferred with a view to proceed against the immovables, it does not follow that the Court cannot execute by arrest. If anything, I.L.R. 39 Mad. 640 seems to take away the Original Court's power.

63 M.L.J. 788, referred.

Even in a case falling under S. 39, cl. (*a*), (*b*) or (*c*) there is no limit on powers of the transferee Court.

A.I.R. 1936 Cal. 521, not followed.

T. A. Anantha Aiyar for Petitioner.

V. S. Rangachari for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 455 of 1936.

20th August, 1937.

Mortgage—Some properties sold in Revenue sale—Mortgagee filing suit for money and not a mortgage suit—If suit maintainable.

Where a plaintiff sued for money due on a mortgage but limited his claim to a money decree on the personal covenant stating that as the mortgage properties (some) had been sold away in a Revenue sale by reason of the mortgagor's default, he did not wish to take proceedings to enforce the security and was content with a money decree, the suit is maintainable. If it be under S. 68 (*c*) of the Transfer of Property Act he has an unconditional right to sue for money, but even taking it that the case falls under either cl. (*a*) or cl. (*b*) of S. 68 the Court has no power to insist upon his filing a mortgage suit even when he does not wish to prefer one.

D. Ramaswami Aiyangar for Petitioner.
V. S. Krishnaswamy Aiyar for Respondent.
S.V.V.

Gentle, J. Application No. 819 of 1937
23rd August, 1937. in
T. O. S. No. 16 of 1931.

Court-fees—Application for letters of administration with will annexed—Order for grant of letters of administration—Applicant being pauper—Issue of letters in forma pauperis—*Permissibility—Civil Procedure Code (V of 1908), S. 4 (1) and O. 33, r. 8—Continuance of proceeding as pauper—Court-Fees Act (VII of 1870), S. 19-I and Sch. I, Art. 11.*

A legatee applied for the grant of letters of administration with the will annexed, paying the requisite court-fee on the application as provided in the Madras High Court-Fees Rules, and subsequently on a caveat being entered it was numbered as a suit and ultimately after contest an order was made for the grant of letters of administration. The legatee then applied for the issue of the same *in forma pauperis* on the ground that he was a pauper and unable to pay the court-fee prescribed by Art. 11 of Sch. I of the Court-Fees Act.

Held, on a reference by the Master, that the provisions of O. 33, Civil Procedure Code, were applicable to proceedings for the grant of probate or letters of administration, that the issue of probate or letters of administration was a proceeding connected with the petition or suit within the meaning of r. 8 of O. 33, and that O. 2, r. 2 of the Madras High Court Original Side Fees Rules exempting a pauper from paying the fees should be read in addition to the provisions of O. 33, r. 8.

I.L.R. 18 Bom. 237 and unreported judgment of Venkatasubba Rao, J., in Application No. 2925 of 1930, relied on.

Held also, that the mandatory provisions of S. 19-I of the Court-Fees Act regarding payment of court-fees for the grant of letters of administration were subject to the provisions of O. 33, r. 8, Civil Procedure Code, which is a specific provision taking effect notwithstanding the provision of S. 4 (1) of the Code.

Held further, that the applicant could continue the application as a pauper notwithstanding the payment of court-fee by him up to that stage. The fact that he had paid court-fee on the original application did not disentitle him from pleading his pauperism.

I.L.R. 53 Mad. 43: 57 M.L.J. 677; 64 M.L.J. 728 and I.L.R. 20 Cal. 319, referred to.

T. S. Venkatesa Aiyar and *C. S. Varadachari* for Applicant.

R. Ramamurthi Aiyar for the Advocate-General (*Sir Alladi*

Krishnaswami Aiyar) instructed by the Government Solicitor for the Government.

B.V.V.

Chief Justice and Varadachariar, J. — O. S. A. No. 52 of 1937.

24th August, 1937.

Costs—Companies Act—Petition for winding up by a creditor—Petition withdrawn—Some creditor respondents appearing by counsel and supporting petition—If entitled to costs of petition.

In November, 1936, a resolution for voluntary winding up of the company was passed. On 11th December, 1936, the appellant asked for an order for winding up under the supervision of the Court. But when the petition came on before Gentle, J., on 27th April, 1937, the petitioner stated that he did not propose to pursue the winding up petition. The learned Judge then enquired if any other creditor would proceed with the petition. Six creditors had entered appearances and professed to support the petition for winding up. But no creditor was willing to go on with the petition. Thereupon the Judge dismissed the petition and directed that the petitioner should pay the costs of all parties appearing before him, that is, seven sets of costs. On an appeal against this order for costs,

Held, that the voluntary liquidator would have been entitled to his costs because he had successfully opposed the petition but as on 27th April, he had stated that he would not press his costs, he did not ask for it.

As for the creditors respondents,

Held, that (Form 9 of O. S. Rules) (Rules under Companies Act) only refers to the appearance of persons who desire to oppose the winding up order and differs materially from the form prescribed by the English Rules which allow interested parties to appear to oppose or to support. R. 101 has not the effect of applying this rule in Madras. The creditors here appeared to support and not to oppose the petition and the petition having failed they are not entitled to costs in their favour. They supported a petition which the Court dismissed. In England it appears to be usual to allow one set of costs to the successful party and where the petition is withdrawn one set even to the supporting creditors but that does not apply here. There was also no justification here for the separate appearance of the respondent creditors.

10 Ch. D. 130, relied on.

K. Krishnaswami Aiyangar and *Mahomed Asker Ali* for Appellant.

W. A. P. Lobo, S. S. Rajagopalan, T. K. Rajagopalan, Kasturi Ranga Aiyangar and *K. M. Balasubramanian* for Respondents.

S. V. V.

Wadsworth, J.
9th August, 1937.

Petition No. 417 of 1936
and
Application No. 246 of 1937.

Contempt—Insolvent's agent refusing to vacate premises found to belong to insolvent, setting up a claim in himself—Insolvent committed for contempt—If agent can be committed for contempt.

An insolvent sold a house to the applicant. After sale there was considerable trouble in getting the insolvent to quit the premises. After the purchaser got into possession of the upper storey, the vendor was continuing in the lower storey with his family. Contempt proceedings were taken against the insolvent who contended that the occupants of the lower storey were not under his power, that his wife was out of his control, etc. That contention was negatived and he was committed for contempt. But his wife continued to remain on the premises. This application was taken to commit her for contempt as the presumed agent of the insolvent. The Court held that the wife was acting under the instigation of the insolvent though she denied it.

But held that there was no provision by which the Insolvency Court can evict the wife, the presumed agent of the insolvent by taking contempt proceedings against her. S. 58, sub-S. (5) is in terms restricted to a refusal of an agent to hand over money and securities belonging to the insolvent. That cannot cover the persistence by an agent of the insolvent in obstructing the delivery of immovable property.

A. S. Natarajan for Respondent.

S. V. V.

Burn and Lakshmana Rao, JJ.
26th August, 1937.

C. M.A. No. 199 of 1936.

Civil Procedure Code (V of 1908), O. 21, r. 66 (2)—Sale proclamation, drawing of without notice to the judgment-debtor—If an illegality or only an irregularity.

Mere omission to give notice to the judgment-debtor under O. 21, r. 66 (2) before drawing up the terms of the proclamation of sale is not an illegality rendering the sale void. It is nothing more than an irregularity.

K. Rajah Aiyar and *P. S. Narayanaswami Aiyar* for Appellant.

T. L. Venkatarama Aiyar and *M. Patanjali Sastri* for Respondent.

S. V. V.
NRC

The Chief Justice and Varada-chariar, J.
30th August, 1937.

C. R. P. No. 945 of 1936.

Stamp Act, S. 35—Insufficiently stamped promissory note—If admissible as acknowledgment of a prior note.

A promissory note dated 5th June, 1932, ran as follows:—"On account of my necessity this day......that is, the amount due for principal and interest on the pronote executed and delivered on 23rd June, 1929, is Rs. 93-3-0; the amount due on the pronote executed and delivered on 6th July, 1929, is Rs. 92-13-0 and the amount due......on the pronote executed and delivered on 14th February, 1931, is Rs. 101. The total is Rs. 287. On demand I promise to pay you or order in one lump sum the principal together with interest thereon at Rs. 1-9-0 per cent. per mensem........" On an one anna stamp the executant's signature was written. In a suit on the note, it was contended that the portion of the note which recited the previous promissory notes was admissible as an acknowledgment of the earlier notes.

Held, that S. 35, Stamp Act, says that the note shall not be admitted in evidence for *any* purpose, nor shall it be acted upon, unless it bears the stamp prescribed by law. The section means that it cannot be admitted under any circumstances in a civil suit.

Passage contra in Mulla's Stamp Act (3rd edn.) at page 122, disapproved.

32 L.W. 691; A.I.R. 1930 Mad. 485 and A.I.R. 1933 Mad. 251, not approved.

(1937) 1 M.L.J. 163, relied on.

V. Viyyanna for Petitioner.

Respondent unrepresented.

S.V.V.

The Chief Justice and Varada-chariar, J.
31st August, 1937.

C. C. C. A. Nos. 45 to 51 of 1935.

Deed of composition—Trustee under the deed—Majority of creditors signing the deed and accepting composition—Trustee paying them all—Balance—Trustee appropriating to his own debt—Prior to appropriation one creditor signifying assent to deed—If trustee can pay balance to himself without paying such creditor—Breach of trust.

One *G.V.*, who was a merchant carrying on business in Madras, became financially involved and by July, 1930, he owed over Rs. 88,000. There were 26 creditors, 14 in Madras and 12 in Mysore. At a meeting of the Madras creditors it was agreed that they should accept a composition of 4 annas in the rupee and a

deed was executed in favour of *B* as trustee for the creditors. *B* was himself a creditor for Rs. 15,000. The Madras creditors in due course signed the deed but the Mysore creditors were not so ready to accept it. They were aware of this proposal by October, 1930, but only two agreed to it and the Madras creditors received the amounts due to them at 4 annas rateable. V. S. and Sons (the appellant) signified his acceptance of the deed by letter dated 24th December, 1930. By that time the Madras creditors and two Mysore creditors, apart from *B*, had all been paid and *B* had in his hands Rs. 3,804-4-6 which was sufficient to pay him at 0-3-9 on the amount due to him. By the time he allocated this (in November, 1931) to his debt, he had notice of appellant's acceptance. Thereupon suits were filed by the appellant and the other creditors who had not signified acceptance against the debtor and the trustee *B*.

Held, that *B* was a trustee in respect of the sum that he received from *G.V.* to be paid to creditors. There was no breach of trust on *B's* part in making the payments to the Madras creditors and the two Mysore creditors. These payments were all made before the appellant or the plaintiffs in the other suits had signified their acceptance. The acceptance need not necessarily be by signing the deed. It may be by other means.

Field v. *Lord Donoughmore*, 1 D.R. & War. 168 and *Biron* v. *Mount*, 24 Beav. 642, followed.

But in so far as *B* paid himself Rs. 3,804-4-6 after he had notice of the appellant's acceptance, he was guilty of a breach of trust. His duty was as a trustee to share that balance rateably with him. So far as creditors who had not signified their assent before *B* distributed the moneys and paid himself are concerned, they cannot claim from him.

V. Radhakrishnayya and *L. Krishna Das* for Appellants.

B. Somayya and *Shross Balakrishna Rao* for Respondents.

S.V.V.

Abdur Rahman, J. C. R. P. No. 986 of 1935.
1st September, 1937.

Civil Procedure Code, O. 33, r. 9—Unregistered deed with regard to subject-matter of suit—If enough to dispauper—Policy of the rule.

A pauper plaintiff entered into an agreement with a third person whereby in consideration of certain sum received from the third person he agreed to pay the sum with interest and if there was default he agreed to give one-fourth of the suit properties. At the instance of the defendant the plaintiff was dispaupered under O. 33, r. 9, C. P. Code.

In revision it was contended that the agreement in so far as it was not registered did not create any interest in the subject-matter of the suit and O. 33, r. 9 contemplates the valid creation of interest in the subject-matter of the suit.

Held, that the language of O. 33, r. 9, Civil Procedure Code, ought to be given effect to as it stands and the plaintiff was rightly dispaupered.

Held, further, that O. 33 has been designed in aid of *bona fide* litigants and it must be strictly confined to such litigants.

A.I.R. 1927 Pat. 352, followed.

T. S. Venkatesa Aiyar for Petitioner.

T. R. Srinivasan for Respondent.

S. V. V.

Varadachariar and Burn, JJ.
3rd September, 1937.

Appeal No. 356 of 1930 and C. R. P. No. 1426 of 1930.

Hindu Religious Endowments Act, S. 9 (2)—Public—Meaning of.

According to the definition in S. 9 (2), the user by the public for the purpose of religious worship has to be proved as a fact. The question of intention to dedicate the place for the use of the public or the user by the public being as of right is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered. Once a fairly long course of user by the public for the purpose of worship is established and the fact of a separate endowment in trust for the deity is also proved it is a fair inference unless the contrary is established particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples that the institution must have been dedicated for user by the public. Similarly when user by the public generally to the extent to which there is a worshipping public in the locality is established it is not unreasonable to presume that the user was of right unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that can only be ascribed to the private character of the institution.

K. P. Ramakrishna Aiyar and *Hrishikesan Nambudripad* for Appellant-Petitioner.

K. Subba Rao for Respondent in both.

S. V. V.

The Chief Justice and Varada-chariar, J.
1st September, 1937.

C. C. C. A. No. 52 of 1935.

Mahomedan Law—Marriage of wife's sister when wife alive—Child of such marriage—If legitimate.

A child of a marriage contracted by a Mahomedan with his wife's sister, the wife being alive, is legitimate.

I.L.R. 23 Cal. 130, dissented from.

I.L.R. 41 Bom. 485 has support of all the principal modern works on Mahomedan Law. The marriage is not void but though invalid during subsistence of the prior marriage would become lawful on the divorce or death of the wife. The bar of unlawful conjunction renders the marriage irregular and not void. If a Mahomedan marries a person contrary to law and it is not possible in any set of circumstances for that union to become regular the issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as issues were concerned.

C. Sarangarajan for Appellant.

A. B. Nambiar and *Raffiuddin Ahmad* for Respondent.

S.V.V.

Varadachariar and King, JJ.
15th September, 1937.

Appeal No. 217 of 1932
and
C. R. P. No. 1306 of 1932.

Hindu Religious Endowment—Temple—Originally private—Admission of public later on—If necessarily makes it a public temple.

If at the inception, a temple was a private temple dedicated for the use of the founder's family and was a private trust, the fact of the admission of the public to the temple later on would not of itself necessarily affect the private character of the trust.

I.L.R. 58 Mad. 104, followed.

G. Lakshmanna and *G. Chandrasekara Sastri* for Appellant-Petitioner.

P. V. Rajamannar for Respondent.

S.V.V.

N R C

The Chief Justice and Madhavan Nair, J. A. S. No. 61 of 1932.

15th September, 1937.

Hindu Law—Family members trustees for several years—Sufficient proof of hereditary trusteeship.

Where the members of the plaintiff's family have been trustees of a temple for over 75 years and the office descended in the plaintiff's family for four generations without any evidence that the office was held by any other family.

Held, that the evidence was sufficient to prove the hereditary right of the office of trustee in the plaintiffs' family.

12 M.I.A. 263 at 268; 10 M.I.A. 19; I.L.R. 36 Mad. 364 and I.L.R. 10 Mad. 292, referred to and followed.

I.L.R. 7 Mad. 499, distinguished.

B. V. Ramanarasu for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

S. V. V.

Pandrang Row and Venkataramana Rao, JJ. Appeal No. 182 of 1936.

22nd September, 1937.

Will—Executor—Not accepting office—Heir-at-law—If can maintain suit for properties under the will not given to him.

A Hindu testator died leaving a will executed in the moffusil bequeathing some of his properties (all situated outside the Presidency Town of Madras) to his widow and others to other persons and some charities and appointed two persons as executors. The executors did not accept office. The widow of the testator brought a suit for recovery of possession of the *entire* estate of her husband from the defendants who were alleged to be trespassers and impleaded the surviving executor also as one of the defendants. The contention of the defendants in possession was that as the widow had not obtained letters of administration with the will annexed, she was not entitled to sue, as legal owner of the properties, except for such of the properties as were specifically bequeathed to her.

Held, that both under English law and under Indian law also after the Probate and Administration Act of 1881 where the executors had not accepted office, the estate of the testator must be deemed in law to have vested in the heir-at-law only and she can maintain an action for trespass and recover the whole estate.

(1898) 2 Ch. 573; (1914) 2 Ch. 504 and (1937) A. C. 626, followed.

I.L.R. 46 Mad. 190 and I.L.R. 59 Cal. 911, referred to.

T. M. Krishnaswami Iyer and *S. Panchapakesa Sastri* for Appellants.

P. S. Narayanaswami Iyer for Respondent.

S. V. V.

Horwill, J. S. A. No. 35 of 1936.
6th September, 1937.

Hindu Law—Hindu temple—Archaka—Practice of his taking Hundi collections—If opposed to public policy.

The practice that the archaka in a temple should take the whole of the Hundi collections for his own maintenance expenses and for the expenses of the pooja is not opposed to public policy nor illegal.

I.L.R. 40 Mad. 212, distinguished.

68 M.L.J. 295, relied on.

B. Somayya for Appellant.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Respondents.

S.V.V.

Burn and Lakshmanarao, JJ. C. M. A. No. 119 of 1936.
17th September, 1937.

Provincial Insolvency Act (V of 1920), Ss. 33, 63, 64 and 74—Summary administration—Framing of Schedule by Receiver—Validity—Final dividend—Notice under S. 64 necessary—Right of creditor to prove his debt.

A debtor was adjudicated an insolvent in 1928 and the Court directed that the estate be administered summarily under S. 74 of the Provincial Insolvency Act. In 1935 an asset worth over Rs. 500 was secured by a cancellation of a conveyance by the insolvent. The Receiver framed a schedule after notice during summary administration and obtained the sanction of the Court. A creditor who did not prove his debt previously applied to prove his debt under S. 33 and Proviso to S. 74 of the Act. The lower Court held that though summary administration was adopted by the Receiver, S. 63 of the Provincial Insolvency Act barred the applicant as he had failed to prove his debt.

Held, that the Receiver had no authority to frame a schedule as it was the duty of Court under cl. (iii) of S. 74 to distribute the assets among the creditors, and that as the dividend was the final dividend, notice prescribed under S. 64 of the Act was necessary.

Held also, that the creditor was not barred by any provision of the Insolvency law from proving his claim.

I.L.R. 55 Bom. 200, distinguished.

A. Lakshmayya for Appellant.

P. Somasundaram for Respondent.

B. V. V.

N R C

Newsam, J. Crl. R. C. No. 108 of 1937
24th September, 1937.

Madras Gaming Act (III of 1930), S. 12—Playing at Cards on a tank bed—If an offence.

Gambling is not a criminal offence in itself. Gambling in a public place, street or thoroughfare is an offence. Where the petitioner and others were caught playing cards for money in a tank bed, they cannot be convicted of gambling in a public place.

I.L.R. 30 Bom. 348, followed.

'Place' in S. 12 of the Madras Gaming Act means from its context a place akin to a street or thoroughfare used regularly and necessarily by people going from one place to another. The real offence dealt with in S. 12 is obstruction or annoyance to wayfarers and pedestrians.

V. T. Rangaswamy Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

The Public Prosecutor on behalf of the Crown.

S.V.V.

Newsam, J. Crl. R. C. No. 228 of 1937.
27th September, 1937.

Criminal Procedure Code (V of 1898), Ss. 110, 117 (4) and 117 (5)—Scope and purpose of—Proof of fact that a person is a habitual offender or desperate or dangerous person—Joint inquiry of persons not associated in all the matters under inquiry whether just or legal.

Two persons were required by an order of a first class Magistrate under S. 112, Criminal Procedure Code, to show cause why they should not be directed to execute bonds with sureties to be of good behaviour, under S. 110, cls. (*a*), (*d*), (*e*) and (*f*) of the Criminal Procedure Code on information given to the Magistrate by the Police containing several charges some of which related to one or the other of the counter-petitioners alone. In respect of both there was the general charge in the preliminary order that they were so desperate and dangerous as to render their being at large without security hazardous to the community. Revision Petition was filed in the High Court to quash the proceedings before the Magistrate on the grounds that the joint inquiry of the two persons was not legal, and that S. 110 was not to be used against the counter-petitioners on allegations like those made against them in respect of any of which neither of them had ever been convicted of any crime.

Held, that since the two counter-petitioners were not associated together in all the matters under inquiry, it was not only not just but also not legal to deal with them both in the same inquiry and further that when one charge is that two persons were so desperate and dangerous as to render their being at large without security hazardous to the community, there can be no intimate connection between two individuals in regard to their characters as to render them liable for a joint inquisition.

I.L.R. 45 All. 109; 47 M.L.J. 689; and I.L.R. 27 Cal. 781, referred to.

Held further, that S. 110 was intended to deal with ex-convicts or habitual criminals and dangerous and desperate outlaws who were so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishments for crime were not sufficient deterrents or adequate safeguards for the public. The section was not obviously intended for use against merely undisciplined people such as local bosses and faction leaders on allegations such as that they were tyrannical and high-handed self-appointed village dictators, that they fined poor people who disobeyed them, punished labouring men for alleged disrespect to them, forced people to put themselves in their power by executing pronotes in their favour and even gratuitously interfered in marriages between their parties. The general rule of law was that every man was presumed not to be a criminal or an offender until he had been found guilty by a competent Court. Regarding S. 117 (4), Criminal Procedure Code, conviction by public opinion should only be permitted to take the place of conviction by Court in rare and exceptional circumstances.

K. S. Jayarama Aiyar, K. Venkataramani and *R. Sundaralingam* for the Petitioners.

T. S. Anantharaman for the Crown.

K. C.

Madhavan Nair and King, JJ. A. S. No. 548 of 1931.

29th September, 1937.

Hindu Law—Joint family—Acquisitions by one member in his name—Small nucleus—Onus of proving that acquisitions were all joint—Nature of nucleus.

One *Va* had an elder brother *Ve*. They were members of an undivided Mitakshara Hindu family. *Va* was in Government service on a salary of Rs. 60 per mensem for about 15 years. In 1875 the brothers partitioned. About Rs. 2,630 came then into *Va's* hands. After their mother's death, he got a sum of Rs. 500 being his share of the money left with her at the partition. This

Rs. 500 came to him long after the acquisition of the suit properties. Rs. 2,000 of the Rs. 2,630 was lent out on mortgage and that was discharged. There was no evidence to show whether any portion of this money was utilised by *Va* in buying the suit properties. If *Va* had no personal income or if the private property were acquired more or less at the time when this money was got back, it may be said that family nucleus has been used to stamp this as joint family property. But these properties were acquired from time to time during various years—1884 a sale for Rs. 9,000, 1885 a house for Rs. 2,000, 1895 another for Rs. 2,750, etc. In 1892 he was worth about Rs. 20,000. There was no evidence that any portion of the ancestral property which he had with him went towards the purchase of any of these properties. Admittedly he did not keep any separate accounts of the income from the ancestral property or of his own private income.

Held, that it is only when a person alleging that the property is ancestral proves that there was a nucleus by means of which other property may have been acquired that the burden is shifted on to the party pleading self-acquisition to prove that the property was acquired without any aid from the family estate. That is, it is only after it is shown that the family was possessed of some property with the aid of which the property in question could have been acquired, that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the joint family estate. Having regard to the cases, the mere proof by the defendant that his grandfather *Va* had with him ancestral property of Rs. 2,630 will not by itself shift the burden of proof to the plaintiff of proving that the subsequent acquired properties were acquired with his private earnings. The defendant, to shift the burden on to the plaintiff, will also have to prove that the ancestral property was such that by its means his grandfather may have acquired the subsequently acquired properties. In the light of the decisions the presumption is against blending.

A.I.R. 1928 Lah. 397; A.I.R. 1935 All. 67; 1937 M.W.N. 835; (1937) 1 M.L.J. 364 and 45 L.W. 442, followed.

17 M.L.J. 184; I.L.R. 33 All. 677 and I.L.R. 46 Mad. 373, distinguished.

Case-law discussed.

T. M. Krishnaswami Aiyar and *P. S. Ramachandra Aiyar* for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

S. V. V.

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The Chief Justice. C. R. P. No. 1416 of 1935.
24th September, 1937.

Award—Arbitration—Private reference—Registration Act (as amended in 1929), S. 17 (1) (b)*—If requires registration.*

A suit was filed for the filing of an award passed by an arbitrator on a private reference under paragraph 20 of Schedule II of the Civil Procedure Code and for the passing of a decree in terms thereof. The properties dealt with under the award were of the value of more than one hundred rupees. The question was whether the award required registration under the Amended Act.

Held, that the award in question required registration and not having been registered cannot be admitted or acted upon by the Court.

I.L.R. 62 Cal. 201 and I.L.R. 15 Pat. 579, followed.

K. Bashyam and *R. Kesava Aiyangar* for Petitioners.

K. Rajah Aiyar, A. S. Srinivasa Aiyar and *S. Seshadri* for Respondents.

S.V.V.

Sir M. Venkatasubba Rao and Appeal No. 135 of 1931.
Sir Abdur Rahman, JJ.
28th September, 1937.

Wakf—Mutavalli selling wakf property as private property—Adverse to trust—Presumption of title in case of long and quiet possession—Limitation Act (IX of 1908), Arts. 142 and 144—Applicability.

Possession of wakf property by an alienee from a mutavalli who purports to sell the same as a private owner of the properties and not as manager of the wakf is adverse to the trust from the date of alienation and possession thereunder as the same amounts to a negation of the trust.

A. S. No. 156 of 1926, followed.

I.L.R. 46 Mad. 751 (P.C.); I.L.R. 12 Pat. 251 (P.C.) and I.L.R. 59 Mad. 809 (P.C.), considered.

The presumption of a lawful origin of title in support of long and quiet possession can properly be drawn, even where an alienation of trust property is made without any recitals of necessity and there is a complete failure of actual evidence owing to lapse of time.

I.L.R. 57 Cal. 1293 (P.C.) and I.L.R. 46 Bom. 481 (P.C.), applied.

Art. 142 of the Limitation Act only governs cases where the plaintiff sues for recovery of possession on the ground of his title

and on the further allegation that the defendant was his tenant, and where the tenancy is found to be not proved during the trial. Art. 144 is not applicable to such cases.

21 L.W. 398, not followed.

Case-law discussed.

K. Rajah Aiyar and *S. Nagaraja Aiyar* for Appellants.

S. Panchapakesa Sastri, K. R. Krishnaswami Aiyar, K. S. Desikan, A. S. Viswanatha Aiyar and *S. Muthiah Mudaliar* for Respondents.

K. C.

The Chief Justice and Madhavan Nair, J. — Appeal No. 38 of 1932.

30th September, 1937.

Hindu Law—Power to adopt given to a widow—Refusal to act thereon—Widow's rights to property whether affected.

On 19th February, 1921, *T* made a will. Therein he appointed three people as executors, named *S* as the person to be adopted, and in case *S's* father refused to give *S* in adoption some other boy was directed to be adopted. The will contained directions for maintenance of the adopted son and widow, for performance of funeral and annual ceremonies, for accumulation of the balance of income and finally for handing over of the estate to the boy to be adopted on his attaining majority. *T* died on 23rd February, 1921.

On 20th March, 1921, the executors created a deed of trust in favour of *S* giving out that *S* had been in fact adopted by *T* on 22nd February, 1921, that is, a day before his death. Thereupon the widow *V* filed a suit O. S. No. 405 of 1921 for a declaration that the alleged adoption was false, that the alleged will was not true and valid and asked for possession of the properties. *S* and the executors were made defendants. The High Court had held (1) that the adoption was false, that the will was true and valid; (2) that on a proper construction of the will the power to adopt was really given to the widow. Though the question of the widow's right to possession under the will was argued, no decision was given thereon and the High Court had decided that the widow was not entitled to possession on her claim as against the will and therefore dismissed the suit.

Thereafter the widow *V* filed a suit out of which the present appeal arises for possession of the properties and for accounts from the executors, on the ground that as nobody had been adopted and as she had decided not to adopt, the executors could not cling on to the properties but must hand them over to her. The executors

defended the suit but their objections were over-ruled and the Court granted *V* a decree for possession and accounts as prayed for.

One of the executors preferred an appeal to the High Court. It was contended that the decision of the High Court in the prior suit operated as *res judicata*, that the will created a trust in favour of the executors, that *S* took the estate as *persona designata* or a Universal Legatee and finally in any event, the widow was not entitled to possession for though she might now be resolved not to adopt she might change her mind and adopt any moment before her death.

Held, (1) that the previous suit did not operate as *res judicata*; (2) that the will did not create a trust in favour of the executors; (3) that *S* was not a Universal Legatee; (4) that though a direction might be given by a will to adopt, the widow was under no legal obligation to do so (I.L.R. 28 All. 377 and 7 M.I.A. 169); and (5) that her refusal to adopt would not deprive her of her rights to property (I.L.R. 7 Cal. 288 and 27 L.W. 370).

Per *Madhavan Nair, J.*—The widow was under no religious obligation to adopt. There are no texts on this point. She cannot be compelled to act upon it unless and until she chooses to do so. Her rights to property could not be affected by her refusal to adopt.

C. Narasimhachari and *M. E. Rajagopalachari* for Appellant.

P. N. Appuswami Aiyar for Respondent.

K.C.

Varadachariar and King, JJ. Appeal No. 114 of 1932.
7th October, 1937.

Hindu Law—Partition—Notice to become divided—If receipt of notice necessary—Will—Letter by a third party regarding the condition of testator on the day—If admissible in evidence.

A father, who was undivided with his son, wrote a letter to him on the 3rd August saying that he wanted to inform him that the jointness of their status is severed and that each may do as he pleases with his share, and sent it by registered post. The next day (4th) he executed a will. The letter was received by the son only on the 9th by which time the father had died.

Held, the will was valid. The authorities lay down generally that the communication of the intention to become divided to other partners is necessary, but none of them lays down that severance in status does not take place till such communication has been received by the other coparceners.

33 L.W. 384 lays down that even if it should be assumed that the date of receipt of the notice by the other coparceners is material the severance of status dates back to the date when communication was sent. The fact that the other coparceners have no choice or option in the matter clearly indicates that the date of the service of notice by them cannot be material. The issue of the notice is enough to prevent survivorship operating. The question as to what will be the position where a notice is posted in circumstances when it will be obviously impossible for it to reach the addressee left open, as then it may be argued that it is merely a device to defeat the law.

Though the condition of the deceased on the day of the alleged execution of the will is relevant, a letter containing a description of that condition purporting to have been written by a deceased person in a letter to a friend is not admissible in evidence either under S. 32 or under any other section of that Act.

Vedantam Satyanarayana for Appellants.

N. Rama Rao for the Respondents.

S. V. V.

Varadachariar and King, JJ. A. S. No. 308 of 1932.
7th October, 1937.

Onus—Hindu Law—Lender of money to a member of a joint family—Onus of proof of necessity—Borrower family in possession of materials bearing on this question—Non-production of—Effect.

The general rule is that a lender who seeks to make the other members of the borrower's family liable must prove that the money was borrowed or applied for family purposes. But in the application of this rule the defendants are not entitled to place undue reliance on this rule of onus if being in possession of materials which will throw light upon the utilisation of the borrowed money they do not care to place such materials before the Court.

I.L.R. 42 Mad. 629, relied on.

B. Manavala Chowdri for Appellant.

Ch. Raghava Rao for Respondent.

S. V. V.

Burn and Lakshmana Rao, JJ.
6th October, 1937.

C. M. As. Nos. 304 of 1934, 9 of 1935, 81 of 1935, 291 of 1935, 94 of 1934, 409 of 1935 and C. R. P. No. 328 of 1935.

Decree—Not engrossed on non-judicial stamp paper—Decree final within meaning of S. 2 (15) of Stamp Act (II of 1899)—Decree whether governed by S. 36 of the Stamp Act—Subsequent engrossment on non-judicial stamp paper—Applicability of S. 37, Stamp Act—Nature of a partition final decree till engrossment on non-judicial stamp paper—Whether executable before proper engrossment.

The plaintiff filed a suit for partition impleading as a party to the suit a commission agent who had to account for large sums of money due to the family and prayed for the recovery of his share of the amount found due on a proper taking of the accounts and the lower Court passed a decree in favour of the plaintiff and the other sharers for the respective amounts due to each sharer on a proper rendering of the accounts. The executing Court refused to execute the decree on the ground that it was not engrossed on a non-judicial stamp paper.

Held, that the decree was a final order of a Civil Court for effecting a partition within the meaning of S. 2 (15) of the Stamp Act.

The fact that the decree was being acted upon and executed for over two years does not bring the matter within S. 36 of the Stamp Act as there is no question of the decree being " *admitted in evidence* " but it was only a question of executing it and thereby " *acting* " upon it, which is prohibited by S. 35 and not cured by S. 36.

The fact that the decree has been subsequently engrossed on a non-judicial stamp paper cannot validate the decree from the date on which it had been passed, nor can it validate the proceedings already taken in execution of such decree. S. 37 of the Stamp Act which validates retrospectively instruments engrossed on a stamp paper of sufficient amount but of improper description does not apply. S. 42 of the Stamp Act provides that when the duty leviable upon an unstamped or insufficiently stamped instrument has been paid, and the instrument has been endorsed, the instrument shall " *thereupon* " be admissible in evidence and may be acted upon, and is in terms not retrospective.

Held also, that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper and till that is done the suit is pending.

I.L.R. 32 Cal. 483, followed.

C. M. A. No. 82 of 1935 and C. R. P. No. 331 of 1935.
N.R.C.

The decree having been executed before the same was engrossed on non-judicial stamp paper, in spite of the objections of the judgment-debtors as to its non-executability, a third party became the Court auction-purchaser. Later on, at the instance of the judgment-debtors the executing Court reviewed the matter, held the decree not executable and refused to confirm the sale.

Held, that there being no decree in existence at the date of the sale, the sale proceedings were a nullity. The auction-purchaser who bought for value at the sale held by the Court *bona fide* and with no reason to suppose that there was anything lacking in the Court's power to sell cannot be protected. I.L R. 14 Cal. 18 and I.L.R. 25 Bom. 337, distinguished, as cases where the executing Court had jurisdiction to sell.

Held also, that an application by an auction-purchaser to confirm the sale-deed did not lie; and an order rejecting such an application was neither appealable nor revisable. Confirmation follows automatically under r. 92 (1) and setting aside the sale follows automatically under r. 92 (2) of O. 21, Civil Procedure Code.

V. Suryanarayana and *K. Kameswara Rao* for Appellants (Decree-holders and Auction-purchaser).

G. Lakshmanna, G. Chandrasekhara Sastri, B. Somayya and *M. S. Ramachandra Rao* for Respondents (Judgment-debtors).

K. C.

Horwill, J. S. A. No. 615 of 1936.

8th October, 1937.

Declaratory suit—Suit by assignee of a pro-note—Decree—Later suit by assignor for a declaration that the assignee had no right in respect of the decree—If maintainable.

The second defendant executed a promissory note in favour of the plaintiff who assigned the same to the first defendant. Subsequently the first defendant filed a suit against the second defendant and obtained a decree. The present suit was brought for a declaration that the first defendant had no right whatever in respect of the decree obtained by him against the second defendant and that it belonged exclusively to the plaintiff.

Held, that the relief as to declaration being in the discretion of Court, whatever might be the effect of the declaration the suit was maintainable.

68 M.L.J. 129, followed.

A. S. Srinivasa Aiyar and *S. Seshadri* for Appellant.

R. Sundaralingam for Respondent.

S. V. V.

The Chief Justice and Madhavan Nair, J.
12th October, 1937.

Cr. M. P. No. 1084 of 1937.

Contempt of Court—Pending case—Newspaper article tending to create prejudice—Intention of publisher and writer if material.

Where the editor of a newspaper published an article which stated with reference to a pending suit that the defendants' case was true, that the plaintiff who was a zamindar had used his influence maliciously and procured convictions of the defendants in criminal cases and added that the conduct of the plaintiff was intended to ruin the defendants who were poor zamin ryots, and the writer and publisher were proceeded against for contempt,

Held, that the article tended to excite prejudice as against the party to the litigation and consequently amounted to contempt of Court. In such a case neither the circumstance that the trial Judge was not likely to get prejudiced on account of the article nor the absence of intention on part of the writer or publisher to prejudice the trial of the suit is material in deciding the question of contempt of Court.

The St. James's Evening Post case, (1742) 2 Atk. 469: 26 E.R. 683; *Littler* v. *Thomson,* (1839) 2 Beav. 129: 48 E.R. 1129; *The William Thomas Shipping Co.,* In re, (1930) 2 Ch. 368 and I.L.R. 55 Mad. 262, referred to.

M. Patanjali Sastri and *P. S. Raghavarama Sastri* for Petitioner.

B. Somayya for Respondents.

B. V. V.

Varadachariar and Abdur Rahman, JJ.
19th October, 1937.

A. S. No. 196 of 1932.

Mutt and Matadhipathi—*Alienation by—Court-sale—If I.L.R. 44 Mad. 831 will apply or I.L.R. 46 Mad. 751—Adverse possession.*

The plaintiff instituted the suit on the footing that he is the present *matadhipathi* of *S* mutt and that the suit properties formed part of the properties of the mutt. The plaintiff sued for recovery of the properties from the defendants, who are in possession in pursuance of a Court auction purchase in 1906. This Court sale was held in execution of a decree obtained on a mortgage executed in 1899 by one *S,* who, it is said, was a kind of joint *matadhipathi* with *A,* the plaintiff's predecessor-in-title. As the defendants are in possession since 1906, they pleaded title by adverse possession. *A* died only in 1919 and this suit was filed in 1927. The lower Court held that the involuntary character of the

sale precluded the application of I.L.R. 44 Mad. 831 to this case and that it came within the principle of I.L.R. 46 Mad. 751.

Held, that it is not a correct statement of the distinction. Where property is held on trust in the strict legal sense, adverse possession may begin to run from the date of the alienation or Court sale, if the alienation or sale was void, for instance when it was made for the discharge of the private debts of the trustee. This case was argued on the footing that the properties were not trust properties but only mutt properties of which the *matadhipathi* was the manager. As stated in I.L.R. 12 Pat. 251, the material question is whether the transaction is one which, though not binding upon the institution, can be held to be good for the lifetime of the particular *matadhipathi*. If the property is not held on strict trust, *prima facie* a mortgage by the *matadhipathi* for an alleged mutt purpose will be binding on the mortgagor and on the mutt properties during the tenure of his office; the execution sale which follows the decree obtained on the mortgage is nothing more than the working out of the mortgage. So it is not correct to regard the execution sale as introducing a new principle for the purpose of determining the question of limitation. So plaintiff will be entitled to claim that limitation should be reckoned only from the date of *A's* death.

T. S. Nataraja Pillai for Appellants.

K. S. Desikan for Respondents.

S. V. V.

Varadachariar and Abdur Rahman, JJ. A. S. No. 56 of 1932.

21st October, 1937.

Deed—Construction—Compromise—Estate given to the widow under the deed—If an absolute estate or a limited estate.

Up to December, 1888, Zemindari *B* was in the possession of one *K*, who died in December, 1888, leaving him surviving a widow *Ka*, a daughter *M* and a step-brother *V*. For many years after 1888 every person connected with this family seems to have proceeded on the footing that this step-brother *V* was disqualified to inherit. The deceased Zemindar had an uncle *Vi*, the grandfather of the first defendant. *Vi* had a son *Kn* who was the plaintiff in O. S. No. 16 of 1889, which was compromised by Ex. B. On the death of *K* disputes arose as to the succession to the Zemindari. Pursuant to certain statements made by the uncles and *Kn* the estate was registered by the Collector in the name of the widow *Ka*. Suit O. S. No. 16 of 1889 was filed by *Kn* on foot of the Zemindari having come to him by survivorship. That suit was compromised

by Ex. B. As regards the Zemindari, the arrangement was that the widow should enjoy it for her life and that *Kn* and his heirs should take it after her death. With regard to certain other properties cl. (6) provided as follows:—"Excluding the said Zemin, the buildings within the palace of Kasba *B*, in the enjoyment of the first defendant, and the nanja, punja and garden lands . . . . . . which belonged to the deceased *K* or which were in his enjoyment in the said Zemin or in other places, shall be held and enjoyed by the first defendant and her heirs, with absolute rights, with powers of alienation by way of gift, exchange, sale, etc., so that the plaintiff and his heirs may not have subsequent claim thereto". Cl. (7) provided "the immovable and movable properties acquired during the lifetime of the said first defendant, either out of the income of the Zemin or out of any other funds, shall exclusively belong to the first defendant with powers of alienation . . . . further after her death, they shall belong to the said first defendant's own heirs".

Held, that the properties covered by cl. (6) and cl. (7) were both taken by the widow absolutely. It may be that if cl. (6) made no reference to heirs at all or to unrestricted powers of disposition but merely granted the estate *simpliciter* to the widow, it would be possible to infer that only a woman's estate and not an absolute estate was intended to be conferred on the widow. But when the clause expressly says that the widow and her heirs should take the property with absolute rights, with powers of alienation, it is not reasonable to say that the words do not connote what their natural meaning conveys. ' Her own heirs ' in cl. (7) was so used, as many cases then held that her savings and investments would pass as part of the main estate and it was not intended to render the " heirs " in cl. (6) refer only to the husband's heirs. The antithesis was between a claim that these acquisitions should pass with the zemindari and a claim that they should pass to the woman's heirs.

K. V. Krishnaswami Aiyar, C. A. Seshagiri Sastri and *K. Chandrasekhara Aiyar* for Appellant.

S. Srinivasa Aiyangar, K. Rajah Aiyar, P. N. Appusami and *D. Ramaswami Aiyangar* for Respondents.

S.V.V.

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[F.B.]

The Chief Justice, Varadachariar and King, JJ.
22nd October, 1937.

O. P. No. 173 of 1936.

Income-tax—Company—Lending moneys—Income largely from such transactions—Clause that borrower must become a

member—Membership fee nominal—Also returnable later—If company a banking concern or a mutual benefit society.

After the decision in 2 Income-tax Cases 386, with regard to this very fund, holding that it was to be treated as a banking concern and not as a mutual benefit society inasmuch as the fund had made considerable profits out of lending money to non-members, the fund altered the memorandum and articles of association by requiring that a person who required a loan must become a member; but he could become a member on payment of one rupee, which he was entitled to withdraw at the end of 2 years. The ordinary shares have been issued to persons who, under the former scheme, would have been non-member borrowers. Unlike I.L.R. 47 Mad. 1, in this case the fund obtained considerable income from loans to non-members. No doubt it now only gives loans to persons who become 'members' but it was found that the membership was merely nominal and the company carries on in reality the same business as it did before alteration of the memorandum and articles of association.

Held, that a person who wants a loan can obtain one from this company, if he pays one rupee for a share and that also is to be paid back to him after 2 years. Out of a gross income of Rs. 33,954-7-8 in the year ending March, 1930, a sum of Rs. 14,217-13-9 represented interest on loans granted to such members and only Rs. 139-11-4 was paid to them as dividend. The large profits which the company made were distributed to its real shareholders. By borrowing from the company, these members made large profits for the company in which they were not allowed to share. In these circumstances the company cannot contend that it is a mutual benefit society and its income is not taxable. The borrowers become members, but members in name only, as their membership does not give them the benefits of members of a mutual benefit society.

(1897) 2 Q.B. 402, followed.

N. Srinivasa Aiyangar for Assessee.

M. Patanjali Sastri for Income-tax Commissioner.

S.V.V.

[F. B.]

The Chief Justice, Varadachariar and King, JJ.
13th October, 1937.

O. P. No. 181 of 1936.

Privy Council—Petition for leave to appeal—Income-tax case—Appeal satisfying the requisites for appeal—If respondent can object on the ground that he cannot bear the costs of appeal—Court if can direct petitioner to pay for costs of appeal here.

Where an application for leave to appeal is made by the Commissioner of Income-tax and there is a substantial question of law involved in it, and it otherwise satisfies valuation, etc., it is not a ground to refuse leave merely because it would put the assessee to considerable expense. No condition can be imposed that the Income-tax authorities should pay his costs. It is for the Privy Council to decide the question of costs.

44 M.L.J. 217, referred to.

M. Patanjali Sastri for Petitioner.

M. Subbaraya Aiyar for Respondents.

S. V. V.

Varadachariar and King, JJ.
26th October, 1937.

Appeal No. 238 of 1932.

Hindu Law—Maintenance—Arrears of—Award of—Principles.

It is stating the legal position too high to say that the award of arrears of maintenance to a Hindu woman is a matter of discretion. The result of the authorities rather is that the plaintiff is entitled to arrears unless there is anything in her conduct precluding her from making that claim or anything to suggest that the defendant might have been misled.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. V. Gopalaswami and *M. Sriramamurthi* for Respondents.

S. V. V.

Varadachariar and Pandrang Row, JJ.
29th October, 1937.

Appeal No. 87 of 1937.

Appeal—Civil Procedure Code, O. 7, r. 11—If applicable to appeals—Application under S. 149—Dismissal of—Appeal barred when deficient court-fee paid—If appeal barred by limitation.

The memorandum of appeal was filed on 23rd March, 1935, which was within the time allowed by law, but with a court-fee of Rs. 5 while memo. of appeal stated the proper fee was Rs. 224-15-0. The papers were returned on more than one occasion for various purposes and on 15th July, 1935, the valuation was amended

N.R.C.

making Rs. 111-5-0 as the correct court-fee payable. This too was not paid for some time and finally an application was filed under S. 149, Civil Procedure Code, for extension of time to pay deficient court-fee and also the court-fee was paid. But by that time, the time for appeal had expired. The petition under S. 149, Civil Procedure Code, was dismissed but it was argued that nevertheless the memo. of appeal cannot be held not to have been in time because on the analogy of O. 7, r. 11 the appellants ought to have been called upon within a time fixed to pay the deficient court-fee and that until that had been done it is not open to the Court to reject the appeal.

Held, O. 7, r. 11 does not apply to appeals.

27 M.L.J. 677; I.L.R. 61 Cal. 663; I.L.R. 1 Lah. 236; 3 Pat. L.J. 74 and I.L.R. 50 All. 980, followed.

In view of the provisions of S. 4 of the Court-Fees Act, it cannot be said that the mere filing of a paper without the proper court-fee amounts to a proper presentation of the appeal for all purposes. Also S. 149, Civil Procedure Code, itself seems to imply that in the absence of an order granting time under S. 149 the presentation of the unstamped or insufficiently stamped memo. of appeal will not amount to a valid presentation. The petition under S. 149 having been dismissed the appeal must be dismissed as not presented in time.

P. Satyanarayana Rao for Appellants.

Ch. Raghava Rao for Respondents.

S. V. V.

Varadachariar and King, JJ. Appeal No. 292 of 1932.
1st November, 1937.

Hindu Law—Father—Business started by—Liability of sons—Personal liability of, by virtue of pious obligation doctrine.

All that I.L.R. 54 All. 564 says is that no charge could be created over the joint family property to secure the repayment of money borrowed for a business started for the first time by the father of a Mitakshara joint family. The Privy Council do not suggest that the sons could not be liable in respect of the debts thus borrowed even under the pious obligation doctrine. The mere fact that a father cannot create a valid charge in respect of such a debt does not exclude the application of the pious obligation doctrine to such debts.

P. V. Vallabacharyulu for Appellant.

P. Somasundaram for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 1347 of 1936.
3rd November, 1937.

Court-fees—Malabar tavazhi—Suit for partition—Debts and mortgages by karnavan—Court-fee payable.

A suit was brought for partition of certain tavazhi properties on the footing that the plaintiff is a junior member thereof and that the suit properties are tavazhi properties. The first defendant is the karnavan of the tavazhi. The plaint refers to certain mortgages and debts and alleges that these are not binding on the tavazhi. In regard to one item, the plaintiff contended that as the karnavan is still in possession of that item, he should not be called upon to pay court-fee so far as regards that item.

Held, following I.L.R. 53 Mad. 540 that court-fee ought to be paid. On the date of suit the first defendant's possession was not on behalf of the tavazhi as per the plaint. Therefore court-fee must be paid under S. 7 (5).

In respect of the debts, the plaint says that they are not binding on him or his tavazhi and has made the creditors also defendants. The plaintiff offered in the High Court to make an amendment of the plaint by limiting the prayer in the plaint to a decision of the question whether the particular item is tavazhi or personal property of the first defendant. The amendment was allowed. The mortgage on this item was made on the footing that this was first defendant's individual property.

Held, on this item no court-fee need be paid on mortgage amount but it is enough if he pays under S. 7 (5). The view in 64 M.L.J. 24 that if the plaintiff in a partition suit attacks a mortgage of joint family property made by the manager and asks for a declaration that the mortgage is not binding on his share he is bound to pay court-fee in respect of such declaration under Art. 17-A (1) doubted, on the ground that it does not consider the question whether such a suit can be regarded as a suit for declaration where no consequential relief is prayed for.

Held, that as regards the debts it is not correct to say that a prayer in a partition suit relating to the binding character of particular debts can be regarded as a prayer in a suit where consequential relief is not prayed for, inasmuch as it is held in I.L.R. 50 Mad. 535 and I.L.R. 17 Lah. 657 that in a partition suit it is proper to make provision for the discharge of family debts.

Once it is recognised as the duty of the Court to make provision for the discharge of binding debts before partition is decreed the suit should be dealt with as one in which consequential relief is prayed for.

I.L.R. 58 Mad. 821 and (1937) 2 M.L.J. 616, not followed.

D. A. Krishna Wariar for Petitioner.

K. Kuttikrishna Menon for Respondent.

K. S. Champakesa Aiyangar for *The Government Pleader* (*K. S. Krishnaswami Aiyangar*) for the Government.

S. V. V.

Varadachariar and King, JJ. Appeal No. 378 of 1932.
4th November, 1937.

Malabar Law—Karnavan—Powers of—Karnavan taking a share in a kuri chit—Tarwad properties charged—If binding on tarwad—Test of binding nature of the transaction.

Where a karnavan of a tarwad executed a security bond as karnavan charging the tarwad properties with the repayment of monies due for 14 instalments in respect of a kuri chit in respect of which he (karnavan) had taken one share, the transaction and the validity of the bond has to be looked at more from the point of view of considering whether it was a prudent exercise of discretion on the part of the karnavan to enter into the chit transaction.

A. S. No. 218 of 1911 (Benson and Sundara Aiyar, JJ.) and 2 Tr.L.J. 443, followed.

These transactions should be viewed not with reference to the rigorous test applied when determining the validity of a borrowing but with reference to considerations of prudence and an honest exercise of discretion by the karnavan in the light of all the circumstances of the case.

B. Sitarama Rao and *N. A. Krishna Aiyar* for Appellant.

T. R. Venkatarama Sastri, A. Sivarama Menon and *Parakat Govinda Menon* for Respondents.

S. V. V.

Pandrang Row, J. C. R. P. No. 384 of 1935.
12th November, 1937.

Civil Procedure Code (V of 1908), O. 41, rr. 27 and 29—Additional evidence—Admission in appeal—Principles governing.

Where additional evidence was tendered to the appellate Court on the ground of its having been discovered subsequent to the judgment of the first Court and that an application for review was unsuccessful, and the appellate Court allowed the additional evidence to be marked as exhibits on the ground that it was necessary to do so "in the interests of justice" but the Court in allowing the appeal finally observed that it did not base its finding on the additional documents which had been perused by the Judge and which pointed to the same conclusion to which the learned Judge had already arrived,

Held, (1) that the appellate Court had no jurisdiction under O. 41, r. 27, Civil Procedure Code, to admit additional evidence unless it required it, that is, finds it needful for the purpose of enabling it to pronounce judgment;

I.L.R. 31 Bom. 381 (P.C.) and I.L.R. 10 Pat. 654 (P.C.), relied on.

(2) that the formula "that it is necessary in the interest of justice" is not enough to satisfy the provision of O. 41, r. 27 (2) which requires the Court to record its reasons for admitting additional evidence;

(3) that where additional evidence is directed to be taken the appellate Court should specify the point to which the evidence is to be confined as required by O. 41, r. 29, Civil Procedure Code; and

(4) that in such cases the opposite party should be given an opportunity to adduce further evidence in rebuttal thereof.

T. R. Venkatarama Sastri and *T. S. Venkatesa Aiyar* for Petitioner.

V. Radhakrishnayya, V. Rajagopala Aiyar and *T. V. Ramiah* for Respondents.

B. V. V.

[F. B.]

The Chief Justice, Varadachariar, Burn, King and Venkataramana Rao, JJ. S. A. No. 393 of 1937.
15th November, 1937.

Madras Court-Fees Act (VII of 1870)—Suit for account, etc.—Relief for account valued by plaintiff—Preliminary decree—Appeal against by defendant—If defendant bound by plaintiff's valuation or can value as he pleases—Final decree—Appeal—Court-fee on amount decreed.

N.R.C.

In a suit for recovery of possession of immovable property and for an account filed in the Court of the Subordinate Judge of Madura, the plaintiff valued his relief, so far as it concerned his claim for an account, at Rs. 3,000. He obtained a preliminary decree, which was followed in due course by a final decree, by which he was declared entitled to recover a total sum of Rs. 32,000. The preliminary decree was appealed against and pending that appeal before the District Judge, the final decree was passed. An appeal was filed against that also and both were heard together by the District Judge. As a result it was held that the plaintiff was entitled only to recover Rs. 6,554-5-2. The defendants appealed then to the High Court and valued their relief at Rs. 100 paying a court-fee of Rs. 11-3-0 thereon and the office accepted it in view of I.L.R. 56 Mad. 705. When the appeal came on for admission before Burn, J., he questioned this right of the plaintiff to value as he pleased and referred the question of the correctness of I.L.R. 56 Mad. 705 to a Full Bench.

Held, that wording of S. 7, cl. (iv) (*f*) and S. 11 read in the light of the history of the section suggest that the defendant was not within the contemplation of those who were responsible for the drafting of the Act. But the Courts in India have always regarded S. 7 (iv) (*f*) as applying to appeals by defendants as well as to appeals by plaintiffs. Even assuming this to be so, it has been understood in this presidency in I.L.R. 23 Mad, 490 and I.L.R. 39 Mad. 725 (F.B.), that a defendant appealing from a preliminary decree for an account has to stamp his memorandum of appeal according to the plaintiff's valuation. Though this decision has not found general acceptance by the other High Courts (*see* I.L.R. 47 All. 756), no reason has been shown to disturb this practice. Even if the effect of I.L.R. 39 Mad. 725 means reading into the clause something which is not there, it does not read into it anything more than those who prefer the Allahabad opinion would read into it.

But when a defendant appeals against the final decree, he knows exactly the value of his relief and must pay court-fee on the amount of the decree passed against him.

I.L.R. 56 Mad. 705, overruled.

I.L.R. 10 Lah. 737, discussed and distinguished as also a case of plaintiff.

K. Raja Aiyar and *R. Rangachari* for Appellant.

K. S. Krishnaswami Aiyangar (*Government Pleader*) and *N. Srinivasa Aiyangar* for Government.

S. V. V.

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Pandrang Row and Abdur Rahman, JJ. L. P. A. No. 11 of 1936.
11th November, 1937.

Civil Procedure Code (V of 1908), O. 21, r. 2 and O. 34, rr. 4 and 5—Agreement between the plaintiff (decree-holder) and one of the defendants in a mortgage suit after preliminary decree but before final decree that the plaintiff will not proceed in execution against some of the items—Final decree passed and execution taken by the plaintiff against all the items—If defendant can set up the agreement in bar of execution.

In a mortgage suit after the preliminary decree was passed an agreement was alleged to have been entered into between the plaintiff and one of the defendants that the plaintiff will not proceed in execution against some of the items of the mortgaged property. After this a final decree was passed for sale of all the mortgaged properties and the plaintiff attempted to sell the properties included in the agreement. The defendant then set up the above agreement in bar of execution and the question arose whether the agreement was one which fell under O. 21, r. 2, Civil Procedure Code, and can be set up in bar of execution. In second appeal Wadsworth, J., held that the agreement being one after the preliminary decree is within O. 21, r. 2 and therefore cannot be set up in execution.

Held, that the agreement can be set up in execution as it did not go in any way against the provisions of the preliminary decree nor did the agreement contemplate any modification of the final decree. Being simply an agreement that the plaintiff should not execute the final decree against certain items it fell within the Full Bench rulings in I.L.R. 40 Mad. 233 and I.L.R. 58 Mad. 994.

K. P. Ramakrishna Aiyar for Appellant.
K. S. Champakesa Aiyangar for Respondent.
S. V. V.

[F.B.]
The Chief Justice, Varadachariar and King, JJ. Appeal No. 287 of 1932.
19th November, 1937.

Limitation Act (IX of 1908), Arts. 36 and 120—Trustees of a public temple—Dues to temple uncollected by a prior trustee—Suit against prior trustee by succeeding trustee—Art. 120 applicable—Starting point.

The plaintiffs and the third defendant were the trustees of a temple on the date of the institution of the suit. The first defendant was the managing trustee of the temple from 1921 to September, 1927. The second defendant is said to have been the trustee

from 26th July, 1914, to 8th February, 1928; the third defendant was appointed trustee on 22nd May, 1927, while the plaintiffs were appointed trustees only in June and July, 1928. The suit was instituted on 15th September, 1930, claiming that the defendants should be directed to pay certain amounts to the plaint temple which were due to the temple but were found to be uncollected and as many of them had become barred the temple had been put to loss thereby. There was a further allegation that in respect of items which had become barred even before the defendants took office, the defendants would be liable to the temple by reason of their failure to take steps against their predecessors in office to recover damages under that head. To this claim the defendants pleaded bar of limitation under Art. 36 of the Limitation Act. In view of the conflict between I.L.R. 20 Mad. 398 and I.L.R. 33 Mad. 308, their Lordships Varadachariar and King, JJ., referred to a Full Bench the questions whether Art. 36 or Art. 120 is the proper article applicable to a suit filed against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect moneys due to the trust and if Art. 120 is applicable, what is the starting point.

Held, by the Full Bench, that Art. 36 could not apply to such suits and the only article which can apply to a suit like this one is Art. 120. As for the starting point of limitation, it depends on whether there is a sole trustee or a number of trustees and whether it is a private trust or a public trust. If there is only one trustee of a public trust and he commits a breach, there is no person capable of suing and therefore the right to sue commences only when a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned, because they will have in themselves the right to sue their co-trustee for the loss occasioned by him. If the co-trustees have also made themselves liable for the breach of trust, the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the *cestui que trust* would ordinarily have the right to sue from the date of the breach of trust. It will, therefore, depend on the circumstances when time will commence to run.

V. Rajagopala Aiyar for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

S. V. V.

Varadachariar and King, JJ. Appeal No. 172 of 1932.
3rd November, 1937.

Limitation Act (IX of 1908), Ss. 22, 28 and Art. 44—Ward's suit against original alienee within 3 years of attaining majority—Alienee from original alienee added as defendant after 3 years—Art. 44 applicable—Deed—Construction—Use of the word 'jointly' in a gift by a Muhammadan to two donees 'jointly'—Whether connotes survivorship.

In a suit by a Muhammadan ward on attaining majority to set aside a sale made by his father guardian and recover possession of the properties sold, certain alienees of portions of the property from the original alienee were added as defendants after 3 years of the ward's attaining majority, *held,* that as regards the properties in their possession the suit was barred. I.L.R. 23 Mad. 271 (P.C.), referred to.

In a deed of gift made by a Muhammadan in favour of his two grandsons 'jointly' and drawn up in the English form, the mere use of the word 'jointly' in the conveying portion does not conclude that the donees were to take the property as 'joint tenants'. In the absence of other indications in the deed itself that survivorship as between the donees was intended, they would take the property in accordance with what would be consistent with their own personal law, namely, as tenants in common.

I.L.R. 23 Cal. 670 (P.C.), relied on.

T. M. Krishnaswami Aiyar and *K. S. Rajagopala Aiyangar* for Appellant.

C. S. Venkatachariar and *S. Sankara Aiyar* for Respondents.

S.V.V.

Venkataramana Rao, J. C. R. P. No. 722 of 1935.
12th November, 1937.

Provincial Insolvency Act (V of 1920)—Application under S. 54—District Judge transferring the same to the Subordinate Judge—Subordinate Judge's Court having no jurisdiction in this insolvency—Transfer invalid.

The Official Receiver preferred an application under S. 54, Provincial Insolvency Act, to set aside a sale by the insolvent and the District Judge transferred the application to the Sub-Judge for disposal. The Sub-Judge dismissed the application and the District Judge set aside the sale. The vendee preferred the revision. The High Court called for a fresh finding and the finding was that the sale was not a sham transaction. It was discovered at the further hearing in the High Court that the application arose in an insolvency which was not within the jurisdiction of the Sub-Court but of the District Court.

Held, that the order of transfer was without jurisdiction and therefore the proceedings were set aside and the District Judge was directed to withdraw the application and dispose of it afresh.

45 L.W. 313, followed.

K. S. Champakesa Aiyangar for Petitioner.

T. E. Ramabhadrachariar for Respondent.

S. V. V.

Pandrang Row, J. C. M. A. No. 123 of 1936.
19th November, 1937.

Provincial Insolvency Act (V of 1920), S. 51—Execution sale—Purchase by appellant, with knowledge of insolvency petition but before adjudication—If purchase bona fide—*Validity of sale, against receiver—Court, if can decide the same under S. 4 of the Act.*

Certain properties which belonged to the insolvents, against whom a creditor's petition to adjudicate them as insolvents was admitted in October, 1932, were sold in Court auction. Notice of the petition was published in the Gazette on 14th January, 1933. After publication in the Gazette, the appellant, another creditor, who was represented throughout by her agent and who took part in a prior attempt to bring about composition, brought the properties to sale with knowledge of the insolvency petition but without informing the Court of the pending insolvency petition and purchased the same and was permitted to set off the purchase money against the appellant's decree amount. The adjudication order in the insolvency was subsequently made and the properties were vested in the Official Receiver, who filed an application to have the sale set aside and for possession of the properties sold in the said Court sale.

Held, that the appellant was not a *bona fide* purchaser or in other words did not purchase in good faith when she purchased the properties of the insolvents and as such was not protected by S. 51 (3) of the Provincial Insolvency Act. The sale was invalid since it took place at a time when the Official Receiver was in law vested with the properties.

Held, further, that the Court had jurisdiction to decide claims of this kind under S. 4 of the Act for the purpose of complete distribution of the property among creditors.

I.L.R. 59 Mad. 928, referred to and explained.

N. S. Srinivasan for Appellant.

K. Kuppuswami for Respondent.

S. V. V.

King, J. S. A. No. 703 of 1936.
1st December, 1937.

Mortgage—Suit by first mortgagee without impleading second mortgagee—Suit by second mortgagee without impleading the first —Decrees in both—Sales in execution—Defendant (first mortgagee purchaser) earlier purchaser—Suit by later purchaser to redeem him—Liability of first purchaser to account for profits received by him.

Properties *A* and *B* were mortgaged to the defendant and property *A* was mortgaged to the plaintiff. Each instituted a suit on his mortgage without impleading the other and bought the properties in Court auction, the defendant being the earlier purchaser.

As the second mortgagee purchaser could not get possession of the item *A* bought by him, the present suit was brought to redeem the defendant.

The lower appellate Court directed redemption and also directed an account of the profits received by the defendant from the date of delivery of possession.

In an appeal by the defendant against the liability to account and the date from which he had to account.

Held, that the first mortgagee defendant was bound to account for the profits received by him from the date of delivery of possession under the prior sale.

46 L.W. 332, applied.

S. Amudachariar for Appellant.

T. E. Ramabhadrachariar for Respondent.

S. V. V.

Pandrang Row and King, JJ. A. S. No. 363 of 1931.
6th December 1937.

Civil Procedure Code (V of 1908), S. 34 (2)—Decree for maintenance—Provision for maintenance—Charge on immovable property created by decree—Decree for payment—Interest on future instalments—Court to be deemed to have refused if decree is silent.

A decree for maintenance though it provides for payment of money in future for future maintenance and though a charge on immovable property is created by the decree, is nevertheless a decree for payment of money within the meaning of S. 34, Civil Procedure Code, and where such a decree is silent with respect to the payment of interest on future instalments of maintenance, the Court shall be deemed to have refused such interest and a

separate suit therefor is barred under S. 34 (2), Civil Procedure Code.

I.L.R. 3 Cal. 602 and I.L.R. 53 Cal. 42, distinguished.

G. Lakshmanna and *G. Chandrasekharasastry* for Appellants.

B. V. Ramanarasu for Respondents.

K. C.

[F. B.]

The Chief Justice, Varadachariar and Mockett, JJ. Case Referred No. 4 of 1936.
6th December, 1937.

Stamp Act, Arts. 40 and 57—Security bond by sureties under S. 21 (1) of Provincial Insolvency Act—Bond by sureties only—Article of Stamp Act applicable.

One *C* applied under the Provincial Insolvency Act to be adjudged an insolvent and under S. 21 (1) was required to give a bond with two sureties for his due appearance in the insolvency proceedings. A bond for Rs. 4,500 was accordingly executed by two sureties in favour of the Sheristadar of the Court and was stamped under Art. 57 of the Stamp Act. The Board of Revenue referred the question "whether the document, a security bond for Rs. 4,500 executed in pursuance of an order of the Court hypothecating also immovable property, should be stamped under Art. 40, Sch. I or under Art. 57, Sch. I of Indian Stamp Act" corresponding to Arts. 33 and 46 of the Madras Stamp Amendment Act, 1922. The bond here was not executed by the debtor but merely by the sureties.

Held, approving 40 C.W.N. 1281 and I.L.R. 52 All. 844 that the obligation undertaken by the sureties was not an obligation connected with the performance of a contract by the insolvent and therefore Art. 40 and not Art. 57 is the appropriate article.

K. S. Krishnaswami Aiyangar (Government Pleader) for Government.

S.V.V.

Pandrang Row and King, JJ. Appeal No. 76 of 1933.
7th December, 1937.

Contract Act (Old Act), S. 178—Possession—Good faith—Meaning of.

The first defendant, a commission agent employed to sell a car belonging to the plaintiff wrongfully pledged it to the second defendant who lent the amount *bona fide* without any knowledge of the plaintiff's ownership. The plaintiff coming to know of the wrongful pledge sued for the recovery of the car or its value.

Held, that as the second defendant was a pawnee in good faith from one who had juridical possession of the car, the plaintiff was not entitled to recover the car without paying the second defendant the amount due to him on the pledge. The definition of " good faith " in S. 3 of the General Clauses Act applies to the Contract Act as well.

W. Kothandaramiah for Appellant.

M. Krishna Barathi and *S. Seshadri* for Respondent.

S.V.V.

Pandrang Row and Abdur Rahman, JJ. L. P. A. No. 33 of 1936.

10th December 1937.

Res judicata—*Co-defendants — Conditions to be satisfied—Conflict of interests between co-defendants—Mere possibility of conflict not enough—Actual conflict necessary.*

O. S. No. 10 of 1921 was filed by *A* as a reversioner against *B* and 21 other defendants for recovery of the estate of *X* the last male holder. *C*, another person claiming as an assignee of the rights of *Y*, contended that he was a nearer reversioner than the plaintiff and wanted to be impleaded as a defendant. *B* did not contest the plaintiff's suit and became *ex parte*. *C* was added as the 23rd defendant after *B* had become *ex parte*. The trial Court found that both *A* and *C* were reversioners of equal degree and passed a decree in favour of both. On appeal by some only of the defendants the Subordinate Judge, finding that neither *A* nor *C* had proved his relationship to the last male holder dismissed the suit in its entirety. On second appeal to the High Court, their Lordships held that the suit should not have been dismissed as against non-appealing defendants also, and in that view restored the decree of the District Munsiff as against the non-appealing defendants but confirmed the finding of the Subordinate Judge that *A* and *C* had not proved their reversionary right. (This judgment is reported in A.I.R. 1928 Mad. 1144.)

Subsequently *B* filed a suit against *A* and *C* for recovery of the estate of *X* on the ground that he was the sister's son of the deceased last male holder '*X*' and that *A* and *C* had no right to the estate.

It was contended on behalf of *C* that the decree in the previous suit O. S. No. 10 of 1921 operated as a bar to the present suit on the principle of *res judicata* between co-defendants.

Held, (1) that as *B* had become *ex parte* before *C* came on record, it could not be said that he was running away from issues of which he has never heard, namely, *C's* claim.

(2) that of the three conditions for *res judicata* between co-defendants enunciated in I.L.R. 53 All. 103 (P.C.), the first condition that there must be a conflict of interest between the defendants could not arise at all and that therefore there was no bar of *res judicata* between the co-defendants.

(3) it is not sufficient that there was a mere possibility of conflict between the defendants *inter se*, there must in fact be an actual conflict between them.

61 M.L.J. 415 (P.C.), referred to and followed.

A.I.R. 1928 Mad. 630, followed.

A.I.R. 1926 Cal. 568; I.L.R. 26 Mad. 104; I.L.R. 28 Mad. 517 and I.L.R. 30 Mad. 461, referred to.

B. V. Ramanarasu for *M. Ramachendra Rao* for Appellant.

B. Somayya and *A. Bhujanga Rao* for Respondents.

S.V.V.

Lakshmana Rao, J. Crl. R. C. No. 443 of 1937.
10th December, 1937.

Indian Penal Code, S. 409—Collections by Village Munsif—Failure to remit into treasury immediately—Remitting the same before complaint—Defence disbelieved—If Village Munsif necessarily guilty.

A Village Munsiff collected fish rent but failed to remit the same immediately. He remitted to the treasury in three instalments. His plea that the Revenue Inspector collected the amounts and it was remitted as and when it was handed over to him by the Revenue Inspector was disbelieved.

Held, in revision, that the fact that the defence was disbelieved cannot lead to a conviction as the Village Munsiff has not been shown to be needy and the money was paid before any complaint was preferred. It might be due to carelessness.

K. S. Jayarama Aiyar and *T. E. Ramabhadrachariar* for Petitioner.

The Public Prosecutor for the Crown.

S.V.V.

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ARJUN DAS KUNDU *v.* MARCHIYA TELINEE, (1936) [1937] 1 Cal. 127.

This case raises an interesting point of Insolvency law which has not been the subject of decision before. The case was one governed by the Provincial Insolvency Act. A person who had practically no assets was adjudged insolvent. As she had no property, there was no vesting order in any Receiver, nor did any creditor submit any proof. She was given absolute discharge. After the discharge, one of the creditors wanted to prove in respect of his debts, as the insolvent got some property by some litigation pending the insolvency. The question was whether the creditor could be allowed to prove after the order of final discharge. The learned Judge has held that he could and also the other creditors, as long as there were properties of the insolvent.

Though the conclusion seems to be reasonable that the insolvent's properties which belonged to the insolvent prior to the discharge should be available to the creditors, the provisions of the Provincial Insolvency Act on the point are by no means clearly in favour of the learned Judge's view. In coming to the conclusion, the learned Judge has relied on the view of the Vaughan Williams, L. J., in In re *McMurdo*: *Penfield* v. *McMurdo*[1], where the Lord Justice said that in the English Bankruptcy Practice a creditor could come in and prove at any time during the administration so long as he did not interfere with the prior distribution of the estate. It must be observed at the outset that it was not a case of a creditor

1. (1902) 1 Ch. 684 at p. 699.

coming in to prove after the discharge of the bankrupt. The effect of a discharge under the English Bankruptcy Acts and the Indian Acts is that the bankrupt is released from certain classes of provable debts. As observed by Sir Dinshaw Mulla in his Tagore Law Lectures on the Law of Insolvency, at p. 278, the effect of a final discharge is to wipe out such debts. It is not merely as under the Limitation Act that the remedy is lost but the debt is extinguished. *See* Williams on Bankruptcy, 13th Edition, p. 131. Cf. *Kathayyan Chettiar* v. *Govindaswami Chettiar*[1]. Speaking of the effect of the discharge under the Bankruptcy law, Lord Blackburn observed in *Thompson* v. *Cohen*[2] that as the word used was "released", the debt was gone. In the face of the above statements of the law, we are not sure that the learned Judge has given full effect to the terms of S. 44 of the Provincial Insolvency Act when he observes that the effect of a discharge is that the insolvent is no longer personally liable, but the properties are still liable for the debts. In this connection, we must notice a single Judge's decision of the Madras High Court in *Doraisami Pillai* v. *Arumuga Naicker*[3], which was argued *ex parte* where it was held that the properties of an insolvent which had passed into the hands of a third person were liable for the insolvent's provable debts after his discharge. We venture to submit that the Madras decision does not give effect to the word "release" in S. 44 which as pointed out above means that the debts are wiped out or extinguished.

Again, the decision of Vaughan Williams, L.J. in In re *McMurdo*: *Penfield* v. *McMurdo*[4], relied on by the learned Judge was not given under any English rule of law corresponding to S. 33 (3) of the Provincial Insolvency Act. In the English law, a creditor has to submit his proof as soon as may be after the receiving order. This corresponds to the provision in the Presidency Towns Insolvency Act, Schedule II, R. 1 with the alteration that under the latter, it is the date of the order of adjudication and not the receiving order. This rule has been held to be directory by reason of the English practice in Bankruptcy. It is not clear that there is any practice in this country under the Provincial Insolvency Act which fixes a

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1. (1931) 35 L.W. 449.
2. (1872) L.R. 7 Q.B.C. 527 at p. 532.
3. (1935) 69 M.L.J. 799.
4. (1902) 1 Ch. 684.

specific date within which proofs have to be submitted under S. 33 (3). The time fixed is the date of discharge. This provision has been understood by the Indian decisions as referring to final discharge. (*Babu Lal Sahu* v. *Krishna Prashad*[1], and *Sivasubramania Pillai* v. *Theethiappa Pillai*[2]). There is a division bench of the Calcutta High Court itself which has taken the same view later than the one under notice. (*Nazar Khan* v. *Barrclough*[3].). *Cf.* Mulla's Insolvency, p. 219. The view of the learned Judge in the case under notice is contrary to all of them. It is a matter for consideration whether the Provincial Insolvency Act has not in this section made a deliberate departure from the English and Presidency Towns Insolvency Acts by fixing a specific date for tendering proofs of claims.

The learned Judge has relied on the effect of S. 64 of the Provincial Insolvency Act relating to a final dividend. It is open to question how far the argument based on the consequences flowing from S. 64 will outweigh the effect of the provisions directly bearing on the point.

BIJAY KUMAR ADDHYA *v.* NAGENDRA NATH PALIT, (1936) [1937] 1 Cal. 1 (F.B.).

This decision brings the view of the Calcutta High Court in line with that of the other High Courts on the question whether a notification "that the Munsifs of Alipore are vested with power to try, under the Small Causes Court procedure, suits for the recovery of rent, etc.", complies with the requisites of clause 8, second schedule of the Provincial Small Cause Courts Act. The High Courts of Madras and Bombay have taken the view that a similar notification complies with the requirements of the clause and the Munsif or Sub-Judge need not be referred to by name. *Soundaram Ayyar* v. *Sennia Naicken*[4], *Ramkrishna Yeshwant* v. *The President of the Vengurla Municipality*[5] and *Sankar Rana Patil* v. *Jagannath Mathura Lal*[6]. There was a conflict of views in the Calcutta

1. (1924) I.L.R. 4 Pat. 128.
2. (1923) 45 M.L.J. 166: I.L.R. 47 Mad. 120.
3. A.I.R. 1936 Cal. 807.
4. (1900) 10 M.L.J. 329: I.L.R. 23 Mad. 547 at p. 555 (F.B.).
5. (1916) I.L.R. 41 Bom. 367.
6. A.I.R. 1928 Bom. 265.

High Court between *Safer Ali Mondal* v. *Golam Mondal*[1] and *Akshoy Kumar Shaha* v. *Hira Ram Dosad*[2]. In one of these cases Sir Asutosh Mookerjee and Beachcroft, JJ., held that the rule required that the notification should from time to time refer to the Munsif or Sub-Judge by name and authorise him to try suits for rent as small cause suits. There does not seem to be warrant for such a strict construction of the rule as a Munsif or Sub-Judge is a Judge of a Court of Small Causes within the meaning of the rule. Sir Lawrence Jenkins, C.J. and N. R. Chatterjee, J. in *Akshoy Kumar Shaha* v. *Hira Ram Dosad*[2] took a view contrary to the one in *Safer Ali Mondal* v. *Golam Mondal*[1] and in conformity with that held in Madras and Bombay. This view has been affirmed and *Safer Ali Mondal* v. *Golam Mondal*[1] has been overruled by the Full Bench of the Calcutta High Court in this case.

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1. (1915) 19 C.W.N. 1236.
2. (1914) 19 C.W.N. 1238 (f.n.).

BAI SAROOBAI *v.* HUSSEIN SOMJI MERCHANT, (1936) I.L.R. (1937) Bom. 18 (F.B.).

It would have been much more satisfactory if the important question of law raised and decided in this case had been referred to a Fuller Bench. It had been taken to be a well-settled rule of Mahomedan Law that under the Hanafi system, a gift of a life-estate operated legally to confer an absolute estate on the donee, on the principle that 'the gift was good and the condition was void'. Doubts were cast on this position by the decision of the Privy Council in *Amjad Khan* v. *Ashraf Khan*[1]. The question was again considered by the Bombay High Court in *Rasoolbibi* v. *Usuf Ajam Piperdi*[2] where however the two Judges differed. One Judge held that the Privy Council decision must be taken to have definitely overruled the earlier view, while the other Judge heldthat the decision left the question untouched. The present Full Bench deals with the question again but the two Judges who had taken differing views adhere to their respective opinions previously given. The decision of the Full Bench is practically that of the third Judge who agrees with the view that the Privy Council decision has overruled the earlier Indian decisions to the contrary.

According to this view, therefore, the gift of a mere life-estate cannot be taken to be a gift of tangible property with a condition attached to it, so as to let in the rule that in all cases the legal effect is to vest an absolute estate in the donee. The question will still be what was the intention of the settlor or donor, having regard to the whole of the document. If the settlor never intended to vest the absolute estate in the donee, that intention will prevail, and the rule will not operate to defeat that intention. The further question which was left open by the Judicial Committee whether the life-estate attempted to be created will be valid even as a life-estate is decided by the Full Bench in the affirmative.

It should however be noted that the majority view as laid down above will have the effect of affecting many titles and transactions that must have taken place, on the faith of the earlier decisions. The dissenting judgment points out that the

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1. (1929) 57 M.L.J. 439: L.R. 56 I.A. 213: I.L.R. 4 Luck. 305 (P.C.).
2. (1933) I.L.R. 57 Bom. 737.

Privy Council decision is not inconsistent with the earlier decisions. It is somewhat difficult to appraise exactly what their Lordships mean and it is hardly satisfactory that their pronouncement should not have been clearer. The Madras High Court held in *Alimamma* v. *Amade Beari*[1] that the Privy Council decision could be distinguished by referring to the reverter clause in the particular document which they were considering and the learned Judge was not prepared to hold that the earlier decisions were really overruled in the absence of a definite pronouncement by the Privy Council.

Having regard to the importance of the point raised and the many titles that will be affected, it would be more satisfactory if the matter is decided by a Fuller Bench.

In re AN ADVOCATE, (1936) I.L.R. (1937) Bom. 99.

Applications for re-instatement by legal practitioners whose names have been struck off the rolls for professional misconduct, must in the nature of things be rare. The decision under notice should be welcomed as stating in careful and unexceptionable terms, the principles which ought to guide the Courts when dealing with such applications. Striking off the rolls is merely a punishment and is really in the nature of a suspension and not necessarily an exclusion for ever. The decision is valuable as giving a guidance as to the materials which should be placed before the Court in such cases so as to satisfy the test laid down. Instances of such applications are collected in the decision of the Calcutta High Court reported in In re *Abiruddin Ahmed*[2].

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1. (1929) 58 M.L.J. 571. 2. (1910) I.L.R, 38 Cal. 309.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* JAY NARAYAN CHANDRA, (1936) [1937] 1 Cal. 160.

The question in this case is one of considerable interest to the subject, as the learned Judge has himself observed in the opening passage of the judgment. Some properties vested in executors were acquired under the Land Acquisition Act. The Collector erroneously, though *bona fide*, thought that the executors had no power to alienate the properties and consequently deposited the amount awarded into the Court and took possession of the properties. The question was whether the executors were entitled to interest on the amount till it was paid over to them. The learned Judge has answered the question in the negative.

We venture to think that if this conclusion is right, the subject under a compulsory purchaser is deprived both of the enjoyment of his land and the interest on the amount awarded for it for no default of his. In the first place, it must be noticed that where a subject is dispossessed under a compulsory acquisition, he is entitled to interest on the amount awarded from the date of the Crown taking possession of the properties unless there is anything in any statute to deny him that right. This was clearly pointed by their Lordships of the Privy Council in *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission*[1]. It is really a branch of the ordinary law as between vendors and purchasers by which the purchaser has to pay interest on the purchase money from the time when he takes possession of the property. *See* S. 55 (4) (*b*) of the Transfer of Property Act which re-enacts the pre-existing law. This rule has been applied in England to cases of compulsory acquisition of land. (See *Swift and Company* v. *Board of Trade*[2], In re *Pigott and the Great Western Railway Company*[3] and *Fletcher* v. *Lancashire and Yorkshire Railway Company*[4].) Therefore the observation of the learned Judge in this case that the liability to pay interest is statutory is open to question, if it is meant thereby that in the absence of statutory provision, the subject is not entitled to interest on the compensation from the date when possession is taken. (See *Inglewood Pulp and Paper Co.* v. *New Brunswick Electric Power Commission*[1] referred to above.) Reference

1. (1928) A.C. 492.
2. (1925) A.C. 520 at 532.
3. (1881) 18 Ch. D. 146.
4. (1902) 1 Ch. 901.

may also be made in this connection to *Vallabhdas Naranji* v. *Development Officer, Bandra*[1] and *The Revenue Divisional Officer, Trichinopoly* v. *Venkatarama Aiyar*[2] where interest has been given on the amount awarded apart from any provision in the Land Acquisition Act.

Then we have to turn to see whether the right to interest has been taken away by anything contained in the Land Acquisition Act. S. 34 of the Act has no such effect, as according to the learned Judge himself it only refers to a deposit contemplated by S. 31 (2) of the Act. S. 31 (2) has only reference to a case where there is in fact no person competent to alienate the land and not where the Collector believes mistakenly that there is no one competent to alienate the land. If therefore under a mistake, the Collector deposits the amount into the Court, when the owner is willing to receive it, there seems to be no reason in principle or under the statute why he should be deprived of the right to interest when he has been dispossessed of the property under a compulsory sale.

MANMATHA KUMAR SHAHA *v.* EXCHANGE LOAN COMPANY, LTD., (1936) [1937] 1 Cal. 283.

In this case, the learned Judge has taken a bold line in the cause of justice and directed a minor to repay in a suit by the creditor the amount of the loan which he borrowed by fraudulently representing that he was an adult. This decision is said to have been based on the equitable rule laid down in S. 41 of the Specific Relief Act. In coming to this conclusion, the learned Judge has followed the Full Bench decision in *Khan Gul* v. *Lakha Singh*[3] which dissents from the decision of the English Court of Appeal in *R. Leslie, Ltd.* v. *Sheill*[4] where the whole question was considered by Lord Sumner who delivered the leading judgment and which was followed by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*[5]. That S. 41 is no new head of equity but is only an enactment of the old English rule that one who seeks equity must do equity is pointed out by the Privy Council in *Mohori Bibee* v. *Dharmo-*

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1. (1929) 57 M.L.J. 139: L.R. 56 I.A. 259: I.L.R. 53 Bom. 589 (P.C.).
2. (1935) 71 M.L.J. 69: I.L.R. 59 Mad. 433.
3. (1928) I.L.R. 9 Lah. 701 (F.B.). 4. (1914) 3 K.B. 607.
5. (1916) 2 A.C. 575.

das Ghose[1]. The minor does not seek any equitable remedy in the suit for him to be put on terms. Further as pointed out by the Privy Council in the same case from the passage in *Thurstan* v. *Nottingham Permanent Benefit Building Society*[2]. "A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person, the legislature has declared to be void."

It is however worthy of consideration whether the decision of the learned Judge may not with greater justification be rested on S. 65 of the Indian Contract Act. By reason of the fraudulent representation as to age by the infant at the time of the transaction, the void nature of the agreement was discovered only later by the creditor. It is then a clear case for the application of the provisions of S. 65 of the Indian Contract Act and the minor is bound to make compensation under the statute, even if not under any rule of equity. The only difficulty in the way of the application of the section is the loose observation by the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[1] that S. 65 starts from the basis of there being an agreement between competent parties and has no application to a case where there never was and never could have been any contract. If this passage is understood as an authority for the proposition that in cases of agreements void *ab initio*, S. 65 has no application, this is clearly opposed to a later Privy Council decision in *Harnath Kunwar* v. *Indar Bahadur Singh*[3] where the question has been considered more fully. See also *Annada Mohan Roy* v. *Gour Mohan Mullick*[4]. The void nature of an infant's agreement does not stand in any different footing and there is nothing in S. 65 which exempts such agreements from its scope. We are aware that the observations of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[1] have been followed in *Motilal Mansukhram* v. *Maneklal Dayabhai*[5] and *Punjabhai* v. *Bhagwandas*[6] but the learned Judges in these cases did not examine closely the observations of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmo-*

1. (1903) L.R. 30 I.A. 114 at 124: I.L.R. 30 Cal. 539 (P.C.)
2. (1902) 1 Ch. 1 at 13.
3. (1922) 44 M.L.J. 489: L.R. 50 I.A. 69: I.L.R. 45 All. 179 (P.C.).
4. (1923) 45 M.L.J. 617: L.R. 50 I.A. 239: I.L.R. 50 Cal. 929 (P.C.).
5. (1920) I.L.R. 45 Bom. 225.
6. (1928) I.L.R. 53 Bom. 309.

das Ghose[1]. The matter was fully examined by Reilly, J., in *Appaswami Aiyangar* v. *Narayanaswami Aiyar*[2] where the learned Judge critically examines them and holds that they cannot be followed in view of the later decision of the Privy Council in *Harnath Kunwar* v. *Indar Bahadur Singh*[3]. In the interests of justice, this view of Mr. Justice Reilly is entitled to careful consideration.

On the other question in the case as to whether a minor is estopped by reason of his representation that he was of full age in respect of an agreement by him, all the High Courts are now agreed that there can be no estoppel as against him. The earlier decisions are collected in *Khan Gul* v. *Lakha Singh*[4] and even the Bombay High Court which took the contrary view has overruled its prior decisions in the Full Bench case of *Gadigeppa Bhimappa* v. *Balangauda Bhimangauda*[5] and has agreed with the other High Courts. The observations of the Privy Council in *Nawab Sadiq Ali Khan* v. *Jai Kishori*[6] are also to a similar effect.

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1. (1903) L.R. 30 I.A. 114 at 124: I.L.R. 30 Cal. 539 (P.C.).
2. (1930) 60 M.L.J. 117: I.L.R. 54 Mad. 112.
3. (1922) 44 M.L.J. 489: L.R. 50 I.A. 69: I.L.R. 45 All. 179 (P.C.).
4. (1928) I.L.R. 9 Lah. 701 (F.B.).
5. (1931) I.L.R. 55 Bom. 741 (F.B.). 6. (1928) 55 M.L.J. 88 (P.C.).

CALCUTTA IMPROVEMENT TRUST *v.* POORNA CHANDRA SINGHA, (1936) [1937] 1 Cal. 300.

In this case, a mortgage deed provided that interest at 6½ per cent. per annum should be paid, if the original rate of interest at 6 per cent. was not paid for fifteen days after it became due and the learned Judge has held that the provision for the higher rate was penal and felt compelled to award the lower rate.

There is no doubt that as the learned Judge points out the mortgage deed was inefficiently drafted. If, on the other hand, the document provided that interest was payable at 6½ per cent. but if it was paid within 15 days of the due date, the interest should only be 6 per cent. per annum, the higher interest would have been awarded in case of default and could not be considered penal in law, though as pointed out by the House of Lords in *Wallingford* v. *Mutual Society*[1] and by Jessel, M.R., in *Wallis* v. *Smith*[2], the distinction between both the classes of cases is irrational. This distinction which has been characterised in strong terms by the greatest judges in England has been introduced into this country and adopted by all the High Courts and by the Privy Council in *Kulada Prosad Chowdhury* v. *Ramananda Pattanaik*[3], *Maung Thu Ka* v. *U Thunanda*[4], *Kutub-ud-din Ahmad* v. *Bashir-ud-din*[5], *Fakir Mahomed* v. *Rangiah Goundan*[6], *Fitz-Holmes* v. *Bank of Upper India, Ltd.*[7], *Burjorji Shapurji* v. *Madhavlal Jesingbhai*[8] and *Mati Lal Das* v. *The Eastern Mortgage and Agency Co., Ltd.*[9]

In the present case, it is difficult to see why the learned judge felt that he was powerless to award the higher rate. The original rate was 6 per cent. and the rate in case of default was only 6½ per cent. Under these circumstances, it is for the Court to decide, as a question of fact, whether the higher rate was or was not intended to be enforced and merely *in terrorem*. It has to be noticed that the explanation to S. 74 of the Indian Contract Act only enacts that the enhanced rate *may* be penal and not *shall* be by way of penalty. That the higher rate is not necessarily penal under S. 74 under such circumstances has been laid down in *Abbakke Heggadthi* v. *Kinhiamma Shetty*[10],

1. (1880) 5 A.C. 685 at 702.
2. (1882) 21 Ch. D. 243 at 261.
3. (1921) I.L.R. 48 Cal. 1036.
4. (1927) I.L.R. 5 Rang. 371.
5. (1910) I.L.R. 32 All. 448.
6. (1913) 1 L.W. 181.
7. (1923) I.L.R. 4 Lah. 258.
8. (1934) I.L.R. 58 Bom. 610.
9. (1920) 25 C.W.N. 265 (271) (P.C.).
10. (1906) I.L.R. 29 Mad. 491.

Sivagnanam Servaigar v. *Ramaswamy Chettiar*[1], *P. C. Paul* v. *K. A. L. R. Firm*[2], *Chuni Lal* v. *Munna Lal*[3], and *Abdul Gani* v. *Nandlal*[4]. In the circumstances of this case, it is doubtful whether the higher rate of interest of half a per cent. a year is at all penal.

Again even if the higher rate is penal, under S. 74 it is perfectly open to the Court to award even the higher rate which is fixed in the document by way of reasonable compensation as it has been awarded in a number of cases. (See *Sundar Koer* v. *Rai Sham Krishen*[5].) We are not sure whether these aspects of the matter were presented before the learned Judge in the decision of the case.

EMPEROR *v.* CHHOTALAL AMARCHAND, I. L. R. (1937) Bom. 183 (F.B.).

This Full Bench decision overrules the earlier decision of the Court in *Abdulsatarkhan* v. *Ratanlal*[6] which followed the Madras decision in *Ruppell* v. *Ponnuswami Thevan*[7] in preference to the Calcutta view in *Nagendranath Shaha* v. *Emperor*[8]. The question turned upon the proper construction of S. 15 of the Indian Merchandise Marks Act. The three years' limitation period for the prosecution of the offence laid down in that section starts from the date of the commission of the *offence charged* and not from the date of the first of the series of similar offences even in cases of a continuous infringement of a trade mark. No doubt this construction involves that a recent and later infringement well within the time-limit may be made the subject of the complaint, even though the complainant has been quiet for more than the statutory period after the infringement originally started. But the difficulties and anomalies of the contrary construction are greater, as pointed out in this judgment and there is really no reason for not reading the section literally without introducing additional words. Even the Madras High Court has in a more recent case taken a similar view and has not followed the earlier decision, see *Md. Ahmad* v. *Venkanna*[9].

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1. (1911) 22 M.L.J. 85 (105).
2. (1923) I.L.R. 1 Rang. 460: A.I.R. 1924 Rang. 46.
3. (1930) I.L.R. 11 Lah. 635.
4. (1902) I.L.R. 30 Cal. 15.
5. (1906) 17 M.L.J. 43: L.R. 34 I.A. 9: I.L.R. 34 Cal. 150 (P.C.).
6. (1935) I.L.R. 59 Bom. 551.
7. (1899) I.L.R. 22 Mad. 488.
8. (1929) I.L.R. 57 Cal. 1153.
9. A.I.R. 1931 Mad. 276.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY *v.* MRS. PIROJBAI, I. L. R. (1937) Bom. 310.

Income may have escaped assessment within the meaning of S. 34 of Income-tax Act even where no assessment proceedings were started at all against the assessee in the previous year, and no notice under S. 22 was served on him. The language is general and would take in all cases where, whatever the cause, the income has actually escaped assessment. There is no good reason why the case of an individual assessee should differ in this respect from the cases of a company which has a statutory duty to make a return of income even without a notice. The expression 'escape' no doubt premises a pursuit from which an escape is contemplated, but this is sufficiently met by the circumstance that every individual who receives the taxable minimum of income is liable in law to be taxed.

MAHARAJA SIR KESHO PRASAD SINGH *v.* BAHURIA MUSAMMAT BHAGJOGNA KUER, (1937) I. L. R. 16 Pat. 258 (P.C.).

This decision of the Board is important as it discusses once again the question how far a judgment not *inter partes* is relevant and admissible under the Indian law and what probative value it has in different circumstances. The rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit is, as stated by their Lordships, accepted as a general rule under English law. The Indian law is the same. In some cases however a judgment whether it is a transaction or not within the meaning of S. 13, cl. (*a*) may be evidence of an assertion of a right under that section but in such cases its probative value may vary considerably according to circumstances. Instances of cases where judgment was relied on as evidence of possession either at a particular date or of ancient possession in some cases can be seen in such cases as *Denomoni* v. *Brojo*[1] and *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*[2].

But ordinarily as evidence of mere assertion of an alleged right a judgment has not much significance and stands on the same footing as a plaint. If the party lost the case, the un-

1. (1901) 12 M.L.J. 83: L.R. 29 I.A. 24: I.L.R. 29 Cal. 187 (P.C.).
2. (1894) 5 M.L.J. 7: L.R. 22 I.A. 60: I.L.R. 22 Cal. 533 (P.C.).

successful judgment is practically useless and even where he has won, the probative value will be greatly discounted where there has been equally assertions of right by the present opponents.

In the present decision, a mere assertion that a person not in possession of the land in suit at the time of the suit claimed several years ago to have had possession from sometime past is not serious evidence of his right. As pointed out by the Judges no real inference bearing on the present rights of parties could be drawn from such circumstance and it will not be sufficient even to shift the burden of proof. In almost all cases, even to the extent to which judgment *inter partes* is strictly admissible, other documents, like the plaint or decree will be found to be sufficient and the judgment is unnecessary to be put in. The attempt is always to get the judgment into the record, not for establishing mere assertion but really for relying on the truth of the findings contained in the same. Here the law is clear that such findings are absolutely inadmissible and should not be looked at.

Another point of importance decided by this case is as to the proper presumption relating to possession in cases where a title is transferred. It is not correct to say that unless the purchaser shows that he took delivery of possession that there is a presumption that the vendor continued in possession. It is for the vendor to establish that he continued in possession adversely to the right of the purchaser by showing receipt of rent or enjoyment, for a period subsequent to the transfer of title.

VENKATAPATHI RAJU *v.* VENKATANARASIMHA RAJU, (1936) 71 M.L.J. 558: L.R. 63 I.A. 397: I.L.R. 1937 Mad. 1 (P.C.).

Renunciation by a member of the joint Hindu family merely extinguishes his interest in the estate and does not affect the status of the remaining members quoad the family property. The separation of one member may have the effect of separation of others *inter se* when it becomes necessary to fix the shares of others in order to determine the share of the separating member subject however to the question whether they have agreed to remain united or to reunite. (*Palani Ammal* v. *Muthuvenkatachala Moniagar*[1].) Such definements of shares is obviously unnecessary when there is only a renunciation by a member. Division of status by reason of a declaration by a member is also similar in character except in the case of a head of branch expressing his determination to be divided which will take away his descendants along with him. (*Ramalinga Annavi* v. *Narayana Annavi*[2].) The father of a joint family has a further right, namely, of disrupting the family at any time during his lifetime without the consent of the sons and if he makes a division it has the effect of separating not only the father from the sons but also the sons *inter se*. A division of right or severance of joint status may result not only by an agreement between the parties but also from any act or transaction which has the effect of defining their shares in the estate. The Madras High Court in this case did not hold differently but they held having regard to the fact that there was very little ancestral property and the property consisted only of certain businesses which stood separately in the names of brothers and in respect of which each had expressed that the others had no interest. This the Madras High Court held, showed that they were only tenants in common. The High Court agreeing with the Court of the instance held however that this statement that the others had no interest was false and was made with a view to get rid of the inconvenient consequences of the contrary position, the businesses in question being respectively arrack and toddy businesses. In view of their Lordships' finding that the family had only a house, and the subsequent acquisitions were apparently only self-acquisitions,

1. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83: I.L.R. 48 Mad. 254 (P.C.).
2. (1922) 43 M.L.J. 428: L.R. 49 I.A. 168: I.L.R. 45 Mad. 489 (P.C.).

the mere conclusion that the family was joint did not have the effect of making the property joint family property necessarily. According to *Suthersanam Maistri* v. *Narasimhulu Maistri*[1] such property if jointly acquired would *prima facie* be joint family property but it is open to members of the family to treat themselves as tenants-in-common. According to the High Court the admission was sufficient indication to show that the businesses were individual businesses and the acquisitions with the income would retain such character though enjoyed by the brothers together. Their Lordships proceed apparently on the view that the only question was whether the brothers were joint or separate. This does not seem to be the right way of proceeding.

MURUGESAM PILLAI *v.* MINAKSHISUNDARA AMMAL, (1936) 71 M.L.J. 831: L.R. 63 I.A. 429: I.L.R. 1937 Mad. 94 (P.C.).

Under a compromise it was provided that the minor plaintiff should be paid Rs. 3,000 future mesne profits of his share and Rs. 12,000 agreed to be paid by the defendant out of affection in all Rs. 15,000 on his executing a receipt within six months of his attaining majority. He died before attaining majority. His heir applied within three years of his attaining majority for the amount. Two questions were raised: (*i*) that the right was personal and was conditional on the minor attaining majority, (*ii*) by reason of S. 17 (1) of the Limitation Act the right was barred, the application being more than three years after the death of the minor though within three years of his death. Their Lordships repelled both the contentions. As regards the first point having regard to the fact that the claim of Rs. 3,000 was in respect of an undoubted right of the plaintiff, their Lordships held that the minor attaining age could not be regarded as a condition but merely indicated the time when payment should be made. In that view their Lordships held that the right to the money accrued only on the date when the minor would, in the course of nature, attain majority and the application being within three years of that point of time, it was in time. S. 17 (1) which provides that the suit should be brought within three

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1. (1901) 11 M.L.J. 353: I.L.R. 25 Mad. 149.

years applies only to cases where the cause of action has already accrued. It is a limitation on the right of the plaintiff and does not accelerate his right of suit or curtail the right of defence of the defendant to a suit brought in respect of a cause of action on the ground that the right has not yet accrued.

SHUKRULLAH *v.* ZOHRA BIBI, (1936) L.R. 64 I.A. 1: I.L. R. 1937 All. 1 (P.C.).

This is an important case as regards practice. When there is a compromise of an appeal pending before the Privy Council, and a minor is involved, their Lordships lay down that the matter should be placed before the High Court and the Court should be made to certify whether in its opinion the proposed compromise is or is not for the benefit of the minor.

MAGAN LAL MARWARI *v.* SITARAM PANNA LAL, (1937) I. L. R. 16 Pat. 290.

Where a decree has been amended, Art. 182, cl. (4) gives a fresh starting point from the date of amendment. The question has arisen whether this sub-clause applies even when the execution of decree is barred at the time of amendment. Earlier decisions held that a decree which had already become time-barred by limitation could not be revived for purposes of execution by a subsequent amendment. (*Ahammad Kutty* v. *Kottakkat Kuttu*[1].)

But this decision and the decisions relied on therein have not been followed subsequently in view of the reasoning of the Judicial Committee in construing Art. 182, cl. (2) of the Act. (See *Nagendra Nath Dey* v. *Suresh Chandra Dey*[2].)

The Madras High Court has specifically ruled that Art. 182 (4) should be read literally as it stands and without inserting into it qualifying words. (*Lakshmikanta Rao* v. *Ramayya*[3].) This practically overrules the earlier decision to the contrary. The present judgment of the Patna High Court

1. (1932) 64 M.L.J. 251: I.L.R. 56 Mad. 458.
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).
3. (1934) 67 M.L.J. 904.

is also to the same effect and reliance is placed on the later Madras decision and the decision of the Calcutta Court in *Durga Prosad Das* v. *Kedarnath Nayek*[1].

The proper time for raising an objection that the decree is barred is at the time of the hearing of the application for amendment and objection should be taken to the same. If however the amendment is allowed Art. 182, cl. (4) will apply as it stands and will furnish a fresh starting point for execution.

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1. A.I.R. 1929 Cal. 650.

SURAT COTTON SPINNING AND WEAVING MILLS, LTD. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, (1937) L.R. 64 I.A. 176: I.L.R. (1937) Bom. 375 (P.C.).

This decision is important to merchants who consign goods for transit by railways. Risk Note B. form approved by the Governor-General in Council under S. 72 (2) (*b*) of the Indian Railways Act, 1890, fell to be construed in this case. Their Lordships analyse the terms of the proviso and point out first that the contractual obligation of disclosure arises at once upon the occurrence of either of the cases (*a*) or (*b*) mentioned in the document and is not confined to the stage of litigation. The scope and extent of this obligation both before litigation and during trial are next stated in clear terms and it is further pointed out that at the close of the evidence for the Railway administration which has to submit their evidence first at the trial, the consignor can complain to the Court that the obligation of disclosure has not satisfactorily been discharged and the Court can and should decide that matter first and pass the necessary orders. Failure to comply with order of Court so passed would amount to breach of the contractual obligation of disclosure and the Courts will be in a position to grant the aggrieved party such damages as may properly be consequential. Apart from and altogether different from this aspect of the Railway's liability there is the other question of a decision on the merits of the dispute as to whether misconduct of the administration can fairly be inferred from the whole of the evidence on record which is available when the evidence on both sides has been given. The general presumptions under S. 114 of the Indian Evidence Act will at this stage be equally applicable to this action as to any other ordinary action and the Courts will weigh and appreciate the evidence accordingly. In the particular case their Lordships point out how the Railway administration had no justification for withholding the evidence of the material witnesses and that was sufficient in the circumstances to justify a finding that there was misconduct by complicity in the theft of the goods by some servant or servants of the Railway and they accordingly gave a decree to the plaintiff for the value of the articles undelivered.

FIRM DEDHRAJ LACHMINARAYAN *v.* BHAGWAN DAS, (1937) I.L.R. 16 Pat. 306.

The soundness of this decision, in so far as it holds that an application for restoration under O. 41, r. 21, Civil

Procedure Code, can be treated as a review and that an order *dismissing* it will furnish a fresh starting point under Art. 182, cl. (3) of the Limitation Act is open to doubt. It is only where there *has been* a review of judgment, that is, where an application for review is *granted* and where the Court thereafter reconsiders the decision and makes a fresh order or decree, that a fresh starting point is given under cl. (3). Even if an application under O. 9, r. 13 or O. 41, r. 21 can be regarded as one for " review" apart from applications which come strictly under O. 47, cl. (3) of Art. 182 will not govern a case where such applications are refused. This aspect of the matter does not seem to have been adverted to in the judgment under notice. The decision in *Kurupam Zamindar* v. *Sadasiva*[1] is a direct decision to that effect and it has been followed by the Patna Court in *Rai Brijraj* v. *Nauratan Lal*[2]. Though this latter judgment of the Patna Court is noticed in the present judgment and dissented from the distinction between cases of dismissal of the application and cases where the application is ordered is not noticed.

Another question raised and discussed in the above decision is as to the applicability of cl. (2) of Art. 182, in cases where the appeal is not against the decree sought to be executed but only against an order dismissing an application for rehearing under O. 41, r. 21. Purporting to follow some observations of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*[3] the judgment holds that cl. (2) will apply. This is contrary to several rulings of the High Courts which however were before the said Privy Council decision. It would seem however that the decision of the Privy Council dealt with quite a different set of facts and their general observations are not necessarily applicable to the present case.

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1. (1886) I.L.R. 10 Mad. 66.
2. (1917) 3 Pat.L.J. 119: 44 I.C. 575.
3. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

ABDUL HAQUE *v.* TARABANNEESSA, (1936) [1937] 1 Cal. 569.

The question whether a tenant can acquire by prescription an easement over the property in the holding of another tenant under the same landlord has been the subject of varying decisions in the High Courts in India. The learned Judge has held in the present case in the case of a right to a water-course, that such an easement cannot be acquired by prescription by one tenant against another tenant holding under the same landlord.

It is clear that under the English Common law, there can be no acquisition of an easement by prescription, as an easement can be acquired by one owner in fee against another owner in fee and when both the tenements are in the ownership of the same owner, he cannot acquire any right against himself and a tenant can only prescribe in the right of his landlord. Nor can such an easement be acquired under the doctrine of a lost grant. *See* per P. O. Lawrence, J., in *Cory* v. *Davies*[1] following *Wheaton* v. *Maple & Co.*[2] and *Kilgour* v. *Gaddes*[3]. Even under the English Prescription Act, S. 2, it has been held in these cases that one tenant cannot acquire an easement against another tenant of the same landlord on similar reasoning, though the contrary has been held in Ireland in *Fahey* v. *Dwyer*[4] and *Beggam* v. *M. Donald*[5] and in an earlier English case of *Daniel* v. *Anderson*[6]. With regard to the acquisition of an easement of light to a building, however, under the English Prescription Act, S. 3, it has been held by the House of Lords on the rule of *stare decisis* in *Morgan* v. *Fear*[7] following *Frewen* v. *Phillips*[8] that one tenant can acquire a right to light to his premises against the premises of another tenant under the same landlord. The reasoning for the distinction is that in the case of an easement of light S. 3 does not require that the enjoyment of it need not be "as of right" under S. 3 of the Prescription Act, while in the case of other easements, it has to be as of right under Ss. 2 and 5 of the Act.

In India, the acquisition of easements by prescription under the statutes is governed by the Easements Act in some provinces and by the provisions of Ss. 26 and 27 of the Indian

1. (1923) 2 Ch. 95 at 107.
2. (1893) 3 Ch. 48 at 63.
3. (1904) 1 K.B. 457.
4. (1879) 4 L.R. Ir. 271.
5. (1878) 2 L.R. Ir. 560.
6. (1862) 31 L.J.Ch. 610.
7. (1907) A.C. 425.
8. (1861) 11 C.B. (N.S.) 449.

Limitation Act in the others. The present case being one from Bengal, it is not governed by the Easements Act and the decision is in accord with the English law on the point as stated above. The question whether the provisions of the Easements Act, S. 15 reproduces the law under the English Act has been doubted by Phillips, J., in *Ponmani Chintugath Koyyammu* v. *Kuttiammoo*[1] though the weight of judicial opinion is that both of them are to the same effect. *See* Per Phillips, J., in *Saminatha Mudaly* v. *Velu Mudaly*[2] and *Ponmani Chintugath Koyyammu* v. *Kuttiammoo*[1], per Abdur Rahim, J. Consequently, it has been held that a tenant cannot acquire an easement against his own landlord in *Basavangudy Narayana Kamthy* v. *Lingappa Shetty*[3] and *Bayya Sahu* v. *Krishna Chandra Gajapati*[4] following *Gayford* v. *Moffatt*[5]. See also *Udit Singh* v. *Kashi Ram*[6] and *Mani Chander Chakerbutty* v. *Baikanta Nath Biswas*[7] cases not governed by the Easements Act. As regards tenants under the same landlord acquiring an easements other than one of light, against one another, it has been generally held in this country following *Kilgour* v. *Gaddes*[8], that it cannot be acquired under S. 15 of the Easements Act or S. 26 of the Limitation Act. (*Madan Mohan Chakravarty* v. *Sashi Bhusan Mukherji*[9], *Radha Kishun* v. *Sunder Mal*[10] and *Moni Chandra Chuckrabutty* v. *Baikanta Nath Biswas*[11]). The contrary view held in *Chotey* v. *Dal Chand*[12], we venture to submit, requires reconsideration.

As regards the right to light, it must be noticed that S. 15 of the Easements Act does not require that its enjoyment should be "as of right" as in the case of other easements. It is therefore possible that in the case of an easement of light to a building governed by the Act, a tenant can acquire by prescription against another tenant of the same landlord following *Morgan* v. *Fear*[13] and *Frewen* v. *Philipps*[14]. See *Hari* v. *Mahadeo*[15]. The contrary would seem to be the result under S. 26 of the Limitation Act, as that section does not make any distinction between an easement of light and other easements.

1. (1918) 37 M.L.J. 28: I.L.R. 42 Mad. 567.
2. (1916) 4 L.W. 128.
3. (1919) 38 M.L.J. 28.
4. (1920) 11 L.W. 600.
5. (1868) L.R. 4 Ch. Appeals 133.
6. (1892) I.L.R. 14 All. 185 (F.B.).
7. (1902) I.L.R. 29 Cal. 363.
8. (1904) 1 K.B. 457.
9. (1915) 19 C.W.N. 1211.
10. A.I.R. 1934 Pat. 11.
11. (1902) 9 C.W.N. 856.
12. A.I.R. 1929 All. 862.
13. (1907) A.C. 425.
14. (1861) 11 C.B. (N.S.) 449.
15. A.I.R. 1921 Nag. 127.

BALU SAKHARAM *v.* LAHOO SAMBHAJI, (1936) I.L.R. 1937 Bom. 508 (F.B.).

Some of the new problems that were bound to arise on the decisions of the Judicial Committee reported in *Amarendra Man Singh* v. *Sanatan Singh*[1] and reaffirmed in *Vijaysingji Chhatrasingji* v. *Shivsangji Bhimsangji*[2] were considered by this Full Bench. Conflicting decisions had been given by the Bombay High Court on some of these questions and the conflict of views necessitated a reference to the Full Bench in view of the frequency of such points arising for decision and the importance of settling the same by an authoritative pronouncement. Unfortunately however, there has not been an unanimity of views and the Full Bench decision suffers to that extent. The view of the majority consisting of two Judges is to the effect that the decision of the Bombay Court in *Chandra* v. *Gojarabai*[3] should be deemed to have been overruled by the above Privy Council decision in so far as that case may be taken as laying down that the adoption itself was invalid but only so far and no further. The actual decision that the adopted son cannot divest the heir in whom the estate had actually vested by inheritance to the last male holder long prior to the adoption is still good and that view has been reaffirmed by the majority opinion. This is so notwithstanding the adopted son would have been a preferable heir to the one who actually inherited, if he had been a natural son and in existence at the time when the inheritance opened. It is according to the majority view immaterial if the actual heir is a more remote heir. Still what has been vested in the heir cannot be divested by the later adoption and the decision to the contrary in earlier cases is overruled. Rangnekar, J., however goes further and holds that the adoption itself is invalid and the later Privy Council decisions do not affect the ruling in *Chandra* v. *Gojarabai*[3] and that the power to adopt should be held to be totally extinguished when there is no joint family and the inheritance opens on the death of the last surviving coparcener. According to the learned Judge the Privy Council cases should be confined to adoption made by widows of deceased coparceners only during the existence of

1. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
2. (1935) 68 M.L.J. 701: L.R. 62 I.A. 161: I.L.R. 59 Bom. 360 (P.C.).
3. (1890) I.L.R. 14 Bom. 463.

the coparcenary itself and cannot be extended to other cases. The practical consequences will be different according as the adoption itself is held to be valid or otherwise and the point therefore still remains an open question. Even according to the majority view the later adopted son will have the right of further inheritance, if the heir who had already taken is only a limited owner and the succession has to be traced again from the last male holder.

KEDARNATH GOENKA *v.* MAHARAJ KUMAR BAGESHWARI PRASAD SINGH, (1937) 2 M.L.J. 202: L.R. 64 I.A. 240: I.L.R. 16 Pat. 382 (P.C.).

The rate of interest on 'mesne profits' is, under the Indian statute, left to the discretion of the Court. The Board point out, in this case, that there will ordinarily be no justification to grant different rates of interest for different periods, unless there were special circumstances or special contract to that effect. In cases of conditional orders for stay of delivery of property, there may be a contract or an undertaking. But as regards 'special circumstances' nothing is indicated in the judgment as to what they may be, but in the nature of things it will not be possible to be more precise. The usual Court rate of six per cent. per annum is ordinarily a fair rate and that is what should be allowed normally.

MAHANTH RAMDHAN PURI *v.* MUSAMMAT PARBATI KUER, (1937) I.L.R. 16 Pat. 476.

This judgment proceeds on the footing that the effect of the compromise decree in the previous suit by the preceding shebait was no more than an alienation by him which was accordingly good only for his tenure of office and that it was open to the succeeding shebait to ignore it and claim the alienated properties for the trust. We are not sure that the position is so clear as it was apparently assumed to be by the learned judges. The prior suit was, it may be noted, one questioning on behalf of the trust, alienations of trust properties by a shebait who was the *predecessor-in-office* of the plaintiff. The defence was that the alienations were for purposes binding on the trust. The plaintiff was suing on behalf of the trust and if the compromise decree was not vitiated by

fraud or collusion, such a decree will be *res judicata* and will bind the successor-in-office also. That the compromise decree did not recite that the plaintiff had satisfied himself as to the binding character of the alienation is neither here nor there. A recital one way or another will not conclude the matter if the facts were otherwise. If the defence was not a mere sham or a pretence but was a genuine one, a *bona fide* compromise relating to a hostile assertion of title is within the competence of the litigating shebait and such a compromise decree should ordinarily be held to bind his successors-in-office also. That the shebaits form a continuing representation of the idol was laid down by the Judicial Committee in *Prosunno Kumari Debya* v. *Golab Chand Baboo*[1].

It is clear that at least in cases where in the prior suit issues are raised and fought out without collusion or fraud the judgment should operate as *res judicata.* It may be noted that quite recently the Privy Council has held that under S. 44 of Indian Evidence Act, proof of fraud or collusion only will be allowed to get rid of a prior judgment and that there is no room, in the face of the clear statutory enactment, to allow other invalidating circumstances like 'gross negligence'. (*Venkata Seshayya* v. *Kotiswara Rao*[2].) That a suit on behalf of an idol has been compromised cannot be itself proof of fraud or collusion. Unless it is taken to be beyond the competence of the shebait to bind his successor except by a contested decision, we do not see why a *bona fide* compromise decree by a shebait at any rate of a suit calling in question an alienation by *his predecessor* should not be held to be *res judicata.* In other cases of representative capacity as in the case of a limited owner like a Hindu widow in possession of her husband's estate, a decree on compromise is as efficacious as a contested decision provided of course other legal requirements are satisfied. The same principle should apply to the case of shebaits also litigating on behalf of idols or family deities.

It may be a different question if a like principle is equally applicable to cases of decrees whether on compromise or on contest where the alienating trustee or shebait is himself the party to the suit and it is his act of alienation that is being

1. (1875) L.R. 2 I.A. 145 (P.C.).
2. (1937) 1 M.L.J. 113: L.R. 64 I.A. 17: I.L.R. 1937 Mad. 263 (P.C.).

challenged. It must be borne in mind that in such cases, apart from the obvious dangers of collusion if not of fraud, the principle that a party cannot be permitted to do indirectly what he cannot do directly may apply. Suffering a decree against the trust may in some cases be tantamount to an alienation itself but that apart it is safer to regard those cases as excluding the doctrine of *res judicata* where the party is either not being sued or precluded by law from being sued in his representative capacity at all except where the pleadings are clear to the contrary and the necessary issues are raised and decided. Whether in such cases even where the party sues or is sued in his capacity as trustee, the rule of constructive *res judicata* should be applied is a more difficult question. If the failure to raise the proper questions on behalf of the trust is 'fraudulent', the judgment may be ignored under S. 44 of Evidence Act. Cases of actual decision on points raised may however come within the ordinary rule as to *res judicata*, there being no scope for personal estoppel. See *Srimath Daivasikhamani Ponnambala Desikar* v. *Periyannan Chetti*[1] and it would seem that except under S. 44 of Evidence Act such judgments must bind the successors also. We may draw attention however to the decision in *Basudeo Roy* v. *Mohant Jugal Kishwar Das*[2] where it may be noted that the compromise decrees were effected by the *guardian* of the shebait who was at all material times a minor and they were not treated as *res judicata* in a subsequent suit by the minor after attaining majority. This case must be regarded as coming within the *special* class of cases giving protection to minors against the negligent actings of their guardians. (See *Venkata Seshayya* v. *Kotiswara Rao*[3]).

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1. (1936) 71 M.L.J. 105: L.R. 63 I.A. 261: I.L.R. 59 Mad. 809 (P.C.).
2. (1918) 35 M.L.J. 5 (P.C.).
3. (1937) 1 M.L.J. 113: L.R. 64 I.A. 17: I.L.R. 1937 Mad. 263 (P.C.).

UPENDRA MOHAN PAL CHAUDHURI *v.* NALINI MOHAN RAY CHAUDHURI, (1936) I. L. R. (1937) 2 Cal. 48.

The question in this case is whether a debt due to the judgment-debtor and another can be the subject of attachment by the decree-holder and if so what is the procedure available for the satisfaction of the decree. So far as a debt due to the judgment-debtor and another is concerned, it has been held by the Court of Appeal in England in *Macdonald* v. *Tacquah Gold Mines Company*[1] under O. 45, r. 1 of the Rules of the Supreme Court which corresponds in some respects to O. 21, r. 46, that it is not the subject of an attachment and a garnishee order cannot be passed in respect of it. This decision has been followed in this country in *Haji Abdulla Sahib* v. *Abdul Lathif Saheb*[2] and *Lakshminarain Khettry* v. *Amar Nath Khettry*[3] on the Original Side of the High Court where garnishee proceedings are available. The Calcutta High Court has made rules in the Civil Procedure Code, that is, O. 21, rr. 46-A to 46-H providing for orders against the garnishee in the cases of some debts. It would seem that on the authority of the above cases, there would be no power to pass garnishee orders in cases where the debts are owed to the judgment-debtor and another even in the mofussil in Bengal in the cases of debts falling under O. 21, rr. 46-A to 46-H. Again it has to be noticed that the procedure prescribed for the attachment of debts under O. 21, r. 46 of the Civil Procedure Code, does not seem to be available for a debt owed to the judgment-debtor and another, as O. 21, r. 46 (3) provides that a payment into the attaching Court of the debt will discharge the garnishee which would be inapplicable where the creditor is the judgment-debtor and another. The learned judges in the case under notice had therefore to consider whether such debts were attachable at all and point out that such debts owned by the judgment-debtor and another are attachable under S. 60 of the Civil Procedure Code, just like any other property owned by the judgment-debtor and another. If so and if there is no mode prescribed for the attachment of such debts, the Courts have under their inherent powers preserved under S. 151 of the Civil Procedure Code, the power to attach such debts by passing prohibitory orders against the judgment-debtor and his

1. (1884) 13 Q.B.D. 535. 2. (1920) 39 M.L.J. 91.
3. (1937) 41 C.W.N. 1074.

debtor on the analogy of O. 21, r. 46. That prohibitory order can be passed under the inherent powers of the Court in cases not falling under O. 21, r. 46 has been recognised in *Abdul Ghani* v. *Simla Banking and Industrial Co.*[1] The further procedure in such a case would seem to be that the judgment-debtor's interest in the debt would be sold in execution and the purchaser would be entitled to sue for the debt along with the other part owner of the debt or making him a party defendant to the suit if he will not join as a plaintiff. In the alternative, a Receiver will have to be appointed in execution who will proceed likewise for recovering the debt. It is however not clear how by an examination under O. 21, r. 41 of the Civil Procedure Code, to which the other part owner of the debt will not be a party, the garnishee may be ordered to pay a part of the debt in satisfaction of his indebtedness to the judgment-debtor, as, so far as he is concerned, his indebtedness is entire and indivisible Cf. *Baraboni Coal Concern, Limited* v. *Gokulananda Mohanta Thakur*[2] and the other part owner will not be bound by any decision as to his share of the debt in execution.

SREE SREE ISHWAR NARAYAN JIU *v.* SOLER, (1936) I.L.R. (1937) 2 Cal. 133.

The question in this case is one of procedure as to whether a shebait can apply by petition to the Court for directions regarding alienation of the debutter property on the ground of necessity or benefit. There is hardly any doubt that the matter can be dealt with by a suit under S. 92 of the Civil Procedure Code. It has also been held that the remedy by suit on the analogy of S. 92 is available even in the case of private religious endowments. (*Bimal Krishna Ghosh* v. *Jnanendra Krishna Ghosh*[3].) The learned judge himself recognises that it has been the practice to pass such orders on application. Under these circumstances, there should be strong grounds for departing from the existing practice. Such an order was passed by West, J., in *Kahandas Narrandas*, In re,[4] as early as 1881 under the Indian Trustees Act. A similar order was also passed by the Calcutta High Court in

1. A.I.R. 1932 Lah. 295.
2. (1933) 66 M.L.J. 399: L.R. 61 I.A. 35: I.L.R. 61 Cal. 313 (P.C.).
3. (1937) I.L.R. (1937) 2 Cal. 105.
4. (1880) I.L.R. 5 Bom. 154.

Nilmoney Dey Sarkar, In re[1]. In provinces to which the Indian Trusts Act has been made applicable, S. 43 of the Trustees and Mortgagees' Powers Act (XXVIII of 1866) providing for trustees approaching the Court by petition for directions has been amended by deleting the provision in the case of trustees. (Cf. *Sir Curimbhoy Ebrahim,* In re[2].) The Indian Trusts Act has however provided for the trustees of private trusts applying for the directions of the Court by application in Ss. 34 and 74 of the Act. In this connection, it must be pointed out that even in cases of public trusts to which the Indian Trusts Act does not apply, it has been held that the trustees can no longer apply for directions under the Trustees and Mortgagees Powers Act. (See *Sir Dinsha Manekji Petit* v. *Sir Jamsetji Jijibhai*[3].) These considerations, however, have no application to Bengal as the Indian Trusts Act has not been extended to Bengal.

Again, it has to be observed that in the case of wakfs, it was held by Pugh, J., in *Halima Khatun,* In re,[4] differing from *Kahandas Narrandas,* In re,[5] that an application could not be made to the Court for directions but that the matter should be brought up only by a suit under S. 92 of the Civil Procedure Code. This view of Pugh, J., was dissented from by a Bench of the Calcutta High Court in *Habibar Rahaman* v. *Saidannessa Bibi*[6] which held that there was no reason to depart from the pre-existing practice of dealing with such matters on a petition. The same view has also been taken by the Allahabad in *Askari Hussain* v. *Chunni Lal*[7]. As in the case of wakfs, the ownership of the property is transferred to the Almighty, so in the case of debutter property, the property vests in the deity and the shebait like the mutwalli is only a manager on behalf of the deity. (Cf. *Vidya Varuthi Thirtha* v. *Balusami Aiyar*[8]). If in the case of wakfs, an application can be made to the Court for directions as to alienation, etc., and a suit is not necessary as laid down in *Habibar Rahman* v. *Saidannessa Bibi*[6] and *Askari Hussain* v. *Chunni Lal*[7] referred to above, there seems to be no reason why the practice in the case of

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1. (1904) I.L.R. 32 Cal. 143.
2. (1910) I.L.R. 35 Bom. 380 (382).
3. (1908) I.L.R. 33 Bom. 509.
4. (1910) I.L.R. 37 Cal. 870.
5. (1880) I.L.R. 5 Bom. 154.
6. (1923) I.L.R. 51 Cal. 331.
7. A.I.R. 1929 All. 849.
8. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).

the Hindu endowments should be changed and the dilatory procedure by a suit should be adopted. The rule as to adherence to the practice of the Court forcibly pointed out by Sir Asutosh Mookerjee in *Habibar Rahman* v. *Saidannessa Bibi*[1] has, we venture to submit, equal validity in the case of Hindu religious endowments as well.

KARAN SINGH *v.* MUSAMMAT TETAR KUER, (1937) I.L.R. 16 Pat. 422 (F.B.).

This Full Bench decision is in line with the preponderance of authority in the High Courts relating to the applicability of S. 7 of the Limitation Act to cases of suit by managers of a Mitakshara joint family. Where an alienation by a guardian of two brothers is sought to be set aside more than three years after the attainment of majority by the elder brother, S. 7 will prevent the same, with regard to the shares of both the brothers. The Madras High Court held so in *Doraisami Sirumadan* v. *Nondisami Saluvan*[2] and has adhered to that view, even after the decision of the Privy Council in *Jawahir Singh* v. *Udai Parkash*[3].

The other High Courts too have taken a similar view though not without conflicting decisions. It may now be taken as fairly settled that S. 7 will ordinarily be applicable to such cases of joint right, where the eldest son is in a position to give a discharge without the concurrence of the other individual members of the family. The question whether S. 7 will apply to cases of execution proceedings where such an elder member is a next friend of the minor brother is more difficult as to which see *Administrator-General, Madras* v. *Radhakrishnan Chettiar*[4]. *See* Mitra's Limitation Act, Vol. II, pages 750-752.

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1. (1923) I.L.R. 51 Cal. 331.
2. (1912) 25 M.L.J. 405: I.L.R. 38 Mad. 118 (F.B.).
3. (1925) 50 M.L.J. 344: L.R. 53 I.A. 36: I.L.R. 48 All. 152 (P.C.).
4. (1935) 70 M.L.J. 700.